NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

James Jackson, et al

Petitioners

vs.

The Fairfax County Board of Zoning Appeals, and

The Trustees of Antioch Baptist Church

Respondents

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY VIRGINIA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the decisions of a Board of Zoning Appeals, a state legislative entity, Bills of Attainder and as such prohibited under U.S. Const. art. I, §10?
2. If these state entitles, referred to at Boards of Zoning Appeals in Virginia or entities of a similar character and function, are to avoid having their decisions voided as unconstitutional because they are Bills of Attainder, what level of procedural due process is required?
3. If the decisions of these Boards of Zoning Appeals are not Bills of Attainder must the Board of Zoning Appeals conduct its hearings in a "quasi-judicial manner?
4. What are the procedural due process requirements of a legislative body acting in a quasi-judicial capacity?
5. Is the exclusion of necessary parties proper during a quasi-judicial hearing, by a legislative body?
6. Is the exclusion of necessary parties proper during the appeal of a decision of a Board of Zoning Appeals or any other state legislative entity, which performs an equivalent function?
7. What criteria should be used to determine if a party is a necessary party during a zoning hearing or during an appeal of said zoning hearing decision?

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James Jackson, Petitioner
Fairwood Acres Citizens Association, Petitioner
Cora Jackson, Petitioner
Carolyn Dougherty, Petitioner
John Dougherty. Petitioner
Cliff Krug, Petitioner
Kathy Krug. Petitioner
Diane Schute. Petitioner
Adrian Murray, Petitioner
Michelle Murray, Petitioner
John Waylonis, Petitioner
David Bucci, Petitioner
Dale Bucci, Petitioner
Charles Newton, Petitioner
Barbara Newton, Petitioner
Yota Kitsantas, Petitioner
Mark Benson, Petitioner
Gary Pisner, Petitioner
William Coffman, Petitioner
Bradley Golden, Petitioner
Peggy Golden, Petitioner
William Sidenstick, Petitioner
Joseph Dickman, Petitioner
Judy Dickman, Petitioner
Louis Rosato, Petitioner
Mary Rosato, Petitioner
William Von Holle, Petitioner
Elizabeth Von Holle, Petitioner
Fairfax County Board of Zoning Appeals. Respondent
The Trustees of Antioch Baptist Church, Respondent

CITATIONS OF OPINIONS AND ORDERS IN CASE

The unpublished decision of the Fairfax County Board of Zoning Appeals can be found in the Appendix (Reprinted in Exhibit A); this decision was appealed.
The unpublished dispositive order of the Appellate Court, the Circuit Court of Fairfax County Virginia, can be found in the Appendix (Reprinted in Exhibit B).
The pertinent part of the Appellate Court's decision was taken from the transcript (page 81) of the dispositive hearing can be found in the Appendix (Reprinted in Exhibit C).
The unpublished Request for Reconsideration of the dispositive order of the Appellate Court, the Circuit Court of Fairfax County Virginia can be found in the Appendix (Reprinted in Exhibit D).
The unpublished order of the Virginia Supreme Court denying Petitioners' Petition for a Writ of Certiorari can be found in the Appendix (Reprinted in Exhibit E).
The unpublished order of the Virginia Supreme Court denying Petitioners' Petition to Rehear can by found in the Appendix (Reprinted in Exhibit F).

JURISDICTIONAL STATEMENT

The Supreme Court of the Commonwealth of Virginia entered an order denying Petitioners' Petition for a Writ of Certiorari, on February 20, 2008, to review the decision of the Circuit Court of Fairfax County Virginia, which had been acting as an appellate court pursuant to Va. Code Ann.§ 15.2-

2314.[1] Petitioners timely filed a Petition for Rehearing. The Supreme Court of the Commonwealth of Virginia entered an order denying Petitioners' Petition for Rehearing on April 25, 2008. This petition was filed within 90 days of that date by first class mail on July 24, 2008, so that this Court has jurisdiction to review the judgment of the trial court on petition for certiorari rests by virtue of Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

U.S. Const. art. I § 10 states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const. amend. XIV, § 1 states:

> All persons born or naturalized in the United State , and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

[1] See Appendix Exhibit E

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

Va. Code Ann. §15.2-2308 states that:

> Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his designated judge or judges in their respective circuit, upon concurrence of such locality... .

Va. Code Ann. §15.2-2309 (2) states:

> 2. To authorize upon appeal or original application in specific cases such variance as defined in Va. Code Ann.

§15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and

purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance...

Va. Code Ann. §15.2-2314 states that:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition [for a Writ of Certiorari] specifying the grounds on which aggrieved within 30 days after the final decision of the board.

STATEMENT OF THE CASE

The legislature of the Commonwealth of Virginia, pursuant to Va. Code Ann. § 15.2-2308, permitted Virginia jurisdictions to create legislative entities called Boards of Zoning Appeals.

This assertion of Petitioners that these Boards of Zoning Appeals are legislative bodies is not in dispute: the Appeals Court (the Fairfax County Circuit Court), the Virginia Supreme Court in its case law, and all parties to this case concur on this point.

One of the functions of these Zoning Boards is to approve special zoning permits to build building, to modify uses of existing building, and to modify the uses of properties, by legislatively modifying local zoning ordinances.

The Loss of Property in this Case

In many instances these special permits can and do adversely affect the properties of people and other entities located in the vicinity of the property that is the subject of a special permit. Granting a special permit can result in the reduction of the value of the surrounding properties, damage to the surrounding properties, and the loss of use of the surrounding properties. Monetary losses due to reductions in properties values and due to damage to

the surrounding properties can be substantial.

On July 11, 2006, during a public hearing, the Fairfax County Board of Zoning Appeals (hereinafter "the BZA") approved an Application Number SPA 90-S-067-3 of Antioch Baptist Church (hereinafter "Applicant") for a special permit to create a very large four building church campus, with two large buildings or a single "Wal-Mart" size building in a small residential neighborhood (the Applicant declined to disclose the specifics to the BZA, to the Appeals Court and to the community). During the hearing some evidence was presented to the BZA indicating that there would be a significant loss of property values and that there would be significant damage to a large recreational lake located near the proposed construction. Even the Appeals Court (the Circuit Court) stated in its July 19 2007 decision (see July 19, 2007 dispositive hearing transcript page 80) that:

> I would concede that the evidence here was pretty weak in that the people opposed to the rezoning brought a real estate appraiser, and I think there was testimony of one person – one homeowner in the area [referring to another church in another part of Fairfax County] – that she had noticed a changed – or she noticed an increase in her value [referring to her property tax assessment] since 1990 when the original church went in. You all know, a Court might find a real estate

> appraiser's valuation is entitled to greater weight than a citizen, but certainly there was evidence in the record on both sides of that issue. And I think, of necessity, in many zoning decisions the surrounding property is going to be affected financially – any shopping center near a residential district – and I can't believe that the Comprehensive Plan – even if I were to find that there is a diminution in property value, the Comprehensive Plan says – or the Zoning Ordinance says you can't have any special permits if it reduces the value of any property. I can't believe that is the law.

The issue of potential damage to a nearby lake (Burke Lake) was raised during the BZA hearing, but BZA's procedural impediments permitted false submissions and false testimony by the Applicant and by the County Staff to go unchallenged.

Bad Procedures Undermining Laws

If one examines Va. Code Ann. §15.2-2309 (2), one is struck by the level of protection – at least on paper – given to affected property owners when a Board of Zoning Appeals determines if a special permit will be awarded, yet bad procedures and insufficient procedural due process can render a good statute impotent and this is how in this case the BZA

accomplished this:

Article VII Paragraph 1(c) of the By-laws (these By-Laws were created by the BZA Board members) of the Board of Zoning Appeals of Fairfax County states that: "No cross-examination or questions of speakers testifying shall be permitted, except by members of the BZA, without the permission of the Chairperson." This constraint does not permit those who are in opposition to an application to challenge the statements or the credentials of those who are called on by the members of the BZA for their expert opinion and/or factual testimony. There were many instances during the hearing where the lack of a right to cross–examine or even speak, by those opposed to the granting of the special permit, led to erroneous testimony, by the Applicant and by Fairfax County Staff, being injected into the proceeding.

For example, in the hearing that is the subject of this petition, the record shows that Health Department Staff proffered inaccurate opinion testimony; The Petitioners had evidence that the testimony was in error, yet there was no mechanism built into the procedures in the By-laws to correct such faulty statements or to challenge the Health Department's Representative's credentials, as would be available in a court of law; because of this, these errors permeated the record and they could not be brought to the attention of the Board during the hearing.

There was a second instance relating to a

transportation related question where, during the hearing, an employee of the Department of Planning and Zoning Administration of Fairfax County (Zoning Staff) was permitted to give hearsay testimony about expert opinions of a third party, who was not even present at the hearing; this would not be permitted in a court of law. There was no right to challenge the faulty hearsay testimony of the speaker or of the person that allegedly made the statement by cross-examination or by any other means.

There were instances during the hearing, where the Board permitted hearsay testimony relating to the level of compliance with the Zoning Ordinance of Fairfax County, where an employee of the Department of Planning and Zoning Administration of Fairfax County was permitted to give hearsay testimony about the expert opinions of a third party who was not present at the hearing; this would not be acceptable in a court of law.

Also, the Fairfax county health department gave hearsay testimony about the septic system capacity withholding from the BZA the fact that capacity calculations were done by a contractor for the Applicant and not the alleged expert witness. Again there was no right to challenge the faulty hearsay testimony of the speaker or of the person that allegedly made the statement or the credentials of this alleged expert witness by cross-examination or any other means; the procedures prevented that.

In addition to the prohibition on cross-examination, during the hearing, there was also a prohibition on objecting to testimony and correcting

faulty statements. There was one glaring incident during the hearing relating to the By-laws Article VII (9) testimony procedure; without any foundation, Counsel for Applicant gave expert testimony, which was incorrect and there was no mechanism in the By-laws for objecting, correcting, or challenging Counsel for Applicant's obvious lack of expertise; although the lawyer had no technical expertise, he was permitted to give opinion testimony on a technical issue; the lawyer's statements were technically incorrect, yet one was not permitted to object to the lawyer's testimony.

There was another incident where one of the members of the BZA made an incorrect statement during the hearing. The Board member made the following factually incorrect statement "on the wetlands issue, I think that I appreciated the concern that the citizens had. I'm certainly not an expert on that. I'm concerned about it, but I feel that if the Corps of Engineers has passed on this"; this highly prejudicial and incorrect statement may have led to the granting of the special permit by the BZA (it was a four to three decision), yet given that the By-laws offered no mechanism for correcting such an incorrect allegation during the hearing, the BZA's By-laws are very defective from a procedural due process standpoint.

Also, from the record of the hearing it is clear that the members of the Board used information acquired from written sources and from ex parte communications that were not within the record, and therefore not made available to the public for comment. Also, individuals, who were opposed to the

Application, were not given full access to the staff that prepared the staff reports. Due to this lack of access, the Petitioners were unable to correct the errors and the misstatements in the Staff Report – especially, given the fact that the report was issued late in the day on June 30, 2006, and none of the Petitioners were able to review the report until July 3, 2006.

Also, as in this case, Applicants were permitted to make substantial yet vague changes in their applications days before a hearing. There are no restrictions in the By-laws on modifying an application just prior to a hearing and there are no notice requirements when there are substantial changes; this is prejudicial to those opposing an application.

These ex parte communications are improper; as is the use, by the Board of Zoning Appeals, of documents that are not on the record or which are not available to the public until the last minute. "The public hearing requirement presupposes that the entire body of evidence relied on by the board to reach its decision must be presented at the open proceedings thereby providing every interested person with an opportunity to either support or object to any particular evidence. Thus the board may not depend on evidence not introduced at the hearing" (See Wasicki v. Zoning Bd. Of City, 163 Conn. 166, 302 A. 2d 276 (1972)).

Also, there is the procedural due process issue in the bias in the amount of time the Board of Zoning

Appeals allocates for testimony pursuant to Article VII (4) of the By-laws of the Fairfax County BZA the "Applicant and/or their authorized agent or attorney are permitted a ten (10) minute presentation of their position, while a designated representative of those opposed to the application are not given an equivalent amount of time.

Also, the Attorney representing the community was not permitted to represent those opposed to the special permit without forfeiting his right to testify.

Article VII (6) of the By-laws of the Fairfax County BZA states that individuals will be permitted to testify for a maximum of three minutes, and a single representative of a civic or homeowners association is given five minutes; this three minute limit undermines those opposing an application from effectively using experts, because three minutes is insufficient time for a technical witness to educate the members of the Board; it takes considerably more time to convey technical information.

In Article VII (8) of the By-laws of the Fairfax County BZA, at the end of testimony, the applicant, their authorized agent, or attorney is given five minutes for rebuttal, or to make additional remarks; those opposing the application, are not given any additional time; this is another procedural asymmetry that gives an improper advantage to the Applicant. Also, expert testimony by the Zoning Staff can be of an unlimited duration and the technical staff or the Zoning Staff are not subject to any questioning of their opinions or their credentials by those citizens opposing an application -- this is

improper.

Other procedural deficiencies included the Applicant's submission of documents during the BZA hearing; these documents were not made available to those opposing the special permit, but was made available to the members of the BZA; even more disturbing is the fact that, as indicated in Petitioners' August 4, 2007 Request for Reconsideration in the Appeals Court (the Circuit Court), some of the documentation that was submitted to the BZA contained false data.

Also, in the BZA's decision, most of the findings did not correspond with the hearing testimony or to any technical document; that is what you get when there is a lack of procedural due process.[2]

Finally, a necessary party, the owner of the lake that would be damaged by the granting of the special permit, the Virginia Department of Game and Inland Fisheries (hereinafter "VDGIF") was never given any formal notice of the BZA hearing and to add to this oversight the Appeals Court refused to include the necessary party VDGIF in the Appeals Court proceedings apparently because of scheduling issues (See findings in Exhibit C in Appendix).

In summary, due to the numerous procedural rules created by the BZA Board Members and implemented by the BZA during the July, 11, 2006 hearing and notice oversights, those opposing the special permit were bared from correcting statements from the BZA which were contrary to the record,

[2] See findings in Exhibit C in Appendix

were bared from questioning the credentials and testimony of those giving expert testimony – including the alleged expert testimony of the Attorney representing the Applicant, were barred from objecting to the extensive use of hearsay expert testimony, much of which was false, and were bared from reviewing written submissions by the Applicant, which contained erroneous information. That is how procedural deficiencies and lack of due process nullified a good law as it did in this instance.

The lack of procedural due process during the BZA hearing was raised initially in Petitioners' Petition for a Writ of Certiorari, which was filed on August 10, 2006, appealing the decision of the BZA to the Circuit Court of Fairfax County pursuant to Va. Code Ann. §15.2-2312 and was argued throughout the Circuit Court proceeding; it was also argued in both of Petitioners' submittals to the Virginia Supreme Court (the Petitioners' Petition for a Writ of Certiorari and Petition to Rehear).

How the Appeals Court Addressed BZA's Lack of Procedural Due Process and Created a New Constitutional Problem

Petitioners had argued on appeal that the BZA hearing was quasi-judicial and because the BZA hearings were quasi-judicial there were procedural due process requirements. The Court, in its July 19, 2007 decision rejected Petitioners' position when it stated that the BZA hearing was not quasi-judicial, but it was a "legislative hearing" and political with limited due process as described in "McIntyre v. Plunkett, 250 Va. 27," (this case was incorrectly

cited by the court; it has nothing to do with procedural due process).

Because the BZA hearing was a "legislative hearing" rather than a quasi-judicial hearing , Petitioners were, according to this Court, guaranteed only notice and a hearing (this right to notice and a hearing is purely statutory); thus pursuant to the Appeals Court's theory, by labeling the BZA hearing as a "legislative hearing," the Court could dismiss any procedural due process issue and reason that – no abuse by the Board, no right deprived, no error made, no conflict of any size will negate the actions of the Board because it is a mini-legislature and like a legislature there are no formal controls or limitations. Apparently the Virginia Supreme Court, by denying Cert concurred with the Appeals Court, although it contradicted the Court's own dicta in Blankenship v. City of Richmond, 188 Va. 97, 104-05, 49 S.E.2d 321, 325 (1948).

By labeling the BZA procedure as legislative and not quasi-judicial the Appeals Court disposed of the procedural due process problem that might have existed if the BZA hearing was quasi-judicial, yet the decision of the court created a new constitutional problem.

As Petitioners pointed out in their August 9, 2007 Circuit Court Request for Reconsideration, in its Virginia Supreme Court Petition for a Writ of Certiorari, and in its Petition to Rehear:

> 'Given that the BZA hearing can be punitive, in that people can and do suffer a financial loss because of a decision of the BZA, if the BZA hearing is legislative, its decision is a bill of attainder and thus unconstitutional. If the BZA hearing is,

contrary to what the Appeals Court has stated in its decision, quasi-judicial than the BZA, due to its restrictive procedures lacked sufficient procedural due process than again the BZA hearing is unconstitutional.. ."

ARGUMENT FOR ALLOWANCE OF WRIT

The decision below should be reviewed because the Appeals Court and the Virginia Supreme Court by denying Petitioners' Petition for a Writ of Certiorari concluded that a legislative body, the Fairfax County Board of Zoning Appeals, was acting procedurally as a legislature during a dispositive hearing; therefore, those people who could suffer financial harm had no procedural due process rights, but only those rights specifically enumerated in the Virginia Code. Other states with legislative entities of the same or similar function of the Virginia Boards of Zoning Appeals approach these hearings as quasi-judicial proceedings and as such these states recognize that these proceedings must have a certain level of procedural due process, particularly because the actions of these boards can result in financial loss, the loss of the use of property, or physical and environmental damage to their property, for the few who own property near a construction that excessively deviates from the norms of a community – but not the Commonwealth of Virginia.

The Board of Zoning Appeals Bill of Attainder

Without a substantial infusion of procedural due process these Virginia Boards of Zoning Appeals legislative hearings are no different from what one would have seen in the 18th century British Parliament or in pre-constitution America, during legislative sessions, where Bills of Attainder

were generated by a legislative body that deprived an individual or a select few of their life, their liberty or their property during sessions laced with innuendo, hearsay, false statements, and false evidence, where the parties who will suffer the loss were either excluded from the legislative proceeding or procedurally restrained from protecting their interests through their questions, corrections, and denials.

It must always be remembered that Bills of Attainder were not trivial footnote in the U.S. Constitution. One of the motivations for the American Revolutionary War was anger at the injustice of attainder. American dissatisfaction with attainder laws motivated their prohibition in the Constitution. The provision forbidding state law bills of attainder reflects the importance that the framers attached to this issue, since the United States Constitution imposes very few restrictions on a state government's power.

Within the U.S. Constitution, the clauses forbidding attainder laws serve two purposes. First, they forbid the legislature from performing Judiciary functions—since the outcome of any such acts of the legislature would of necessity take the form of a bill of attainder. Second, they embody the concept of Due Process which was later reinforced by the Fifth and the fourteenth Amendment of the United States Constitution. The motivation of the framers of the US Constitution for prohibiting Bills of Attainder can be found in Federalist Paper #44, which states:

Bills of attainder ..., are contrary to the

first principles of the social compact, and to every principle of sound legislation. [Bills of attainder are] expressly prohibited by the declarations prefixed to some of the State constitutions and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and

> influential speculators, and snares to the more industrious and less informed part of the community.

In Cummings v. Missouri, 71 U.S. 277 (1867) this Court defined a bill of attainder as:

> a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment."

In U.S. v. Lovett, 328 U.S. 303 (1946) this Court defined a Bill of Attainder as a:

> Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, are 'bills of attainder' prohibited under this clause.

Given the procedural deficiencies of the BZA hearing, given that the hearing , which is the subject of this appeal, was according to the Appeals Court not a "judicial trial," but procedurally a "legislative

hearing," "given the monetary losses, which inflict punishment and would be directed against easily ascertainable members of a small group of people in a small community by the legislative act of the BZA (which the BZA decision was), Petitioners assert that the decision of the BZA was, in every aspect, a bill of attainder, issued by a legislative body in the Commonwealth of Virginia, and as such the decision of the BZA is unconstitutional under U.S. Const. art. I § 10.

It is unclear if the legislature of the commonwealth of Virginia gave any consideration to the possibility the legislation crated by these legislative boards were unconstitutional. Perhaps their concerns were reduced because many states use a similar mechanism for addressing zoning issues, perhaps the legislature felt that unlike the Bills of Attainder issued by the British Parliament and by the states prior to the ratification of the United States Constitution the proceeding where these zoning related legislative acts were issued would have a critical mass, from a procedural due process standpoint, to avoid the bill of attainder taint. As one can see from the present case, if that was their intent, they did not succeed and for that reason, the decision of the Board of Zoning Appeals (see Exhibit A in Appendix) should be voided as a Bill of Attainder.

Procedural Due Process and Zoning Boards

In its July 19, 2007 decision, the Appeals Court, citing to Goldberg v. Kelly, 397 U.S. 254

(1970), incorrectly concluded that there is no right to cross-examine or correct misconceptions of a fact finder during non criminal matter, except for welfare related issues. (The Trial Court indicated that Goldberg was limited to Welfare cases); this is incorrect. In instances, such as in this case, where there is a need to protect persons, not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property, procedural due process is constitutionally required (see Carely v. Piphus 435 U.S. 247, 259 (1978) and Mathews v. Eldridge 424 U.S. 319, 344 (1976)). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests (see Fuentes v. Shevin 407 U.S. 247, 259 (1978)). Given the potential financial loss to the community and given the potential loss to the citizens of Fairfax County and to the Commonwealth of Virginia, the right to cross-examine witnesses or even to be heard during critical stages in a proceeding, to challenge inaccurate and groundless assertions are the only means to "minimize substantively unfair or mistaken deprivations" that can arise from bad zoning decisions. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," (see Morrissey v. Brewer, 408 U.S. 471 (1972)). In this instance the chance of mistaken deprivations was high, as such due process along with its tools, including the right to cross-examine, should have been made available to Petitioners. Even if this Court does not accept

Petitioners' argument that BZA's decision was a bill of attainder, this Court should as least hear the case so that it can prescribe the amount and type of procedural due process necessary during zoning related legislative hearings.

The Exclusion of Necessary Parties

If one reviews the record of this case one can see that most of the concerns of the BZA and of the Appellate Court was directed to Burke Lake, a 218-acre lake in Fairfax County; as the largest lake in Fairfax County, Burke Lake is a 218-acre reservoir and one of the most heavily fished lakes in Virginia. This lake is located about one mile downstream from the property that was granted the special permit in this case, yet the BZA never gave formal notice of the hearing to the owner of Burke Lake: The Virginia Department of Game and Inland Fisheries ("VDGIF"), rather it was the Petitioners who informed VDGIF of the problem special permit application; also the Appeals Court made no effort to include the VDGIF in the appellate proceedings – even when asked to do so by Petitioners. The reason why VDGIF was excluded was never made clear by the Appellate Court; however, it appeared that the Appellate Court was concerned that bringing in the VDGIF would delay the proceedings.

In its Virginia Supreme Court Brief in Opposition, Respondent argued that VDGIF does not have a legal or beneficial interest in the property subject to the Application which is likely either to be defeated or diminished by the appeal.

It was an undisputed fact that Applicant's

proposed construction will destroy wetlands and alter and eliminate parts of the watershed of Burke Lake. The VDGIF has expectations based on the Fairfax County comprehensive plain and on zoning restrictions that the watershed will not be damaged or diminished. The special permit process is a mechanism that is designed to permit an application to deviate from Fairfax County's zoning restrictions. Given that VDGIF has an interest in maintaining the watershed of its lake, which this proposed construction is part of, and the watershed will be diminished and the lake, according to testimony, will be damaged. Given due process requirements, necessary parties for both the BZA hearing and for the Appeal would be those whose property would be damaged –but again, the BZA hearing was procedurally a legislative hearing and there were no due process requirements.

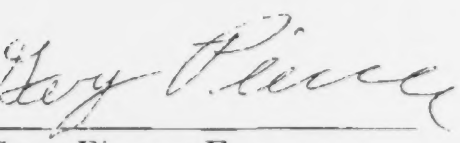
CONCLUSION

For the foregoing reasons, the decision below should be reviewed by this court. In this instance the decisions of the lower courts and the actions of the Fairfax County Board of Zoning Appeals in granting a Special Permit to Applicant was either void because it was an unconstitutional bill of attainder or invalid due to the lack of sufficient procedural due process during the BZA hearing.

Virginia is not the only state that uses legislative boards to decide zoning related issues. Given the lack of pertinent case law and given the constitutional restrictions on issuing bills of

attainders, it is unclear if the use of legislative board to decide zoning issues is proper even with a judicial level of due process; Petitioners assert that there is a need for this Court to make such a determination; moreover, it is unclear how much procedural due process is required during a legislative hearing to prevent the legislation of such a legislative body from being labeled a bill of attainder; this is another issue where there is no significant case law; it is an area of the law where there are few answers and many questions.

Respectfully Submitted,
Pisner & Pisner, Attorneys

By: 

Gary Pisner, Esq.
Attorney of Record for Petitioners

APPENDIX

Exhibit A

COUNTY OF FAIRFAX, VIRGINIA

SPECIAL PERMIT RESOLUTION OF THE BOARD OF ZONING APPEALS

TRUSTEES OF THE ANTIOCH BAPTIST CHURCH, SPA 90-S-057-03 Appl. under Sect(s). 3-103 and 3-C03 of the Zoning Ordinance to amend SP 9Q-S-057 previously approve for church to permit increase in land area, building addition and site modifications. Located at 10901 and 10915 Olm Dr., 6525 and 6531 Little Ox Rd., 6340 Sydney Rd. and 6400 Stoney Rd. on approx. 20.91 ac. of land zoned R-1, R-C and WS. Springfield District. Tax Map 77-3 ((3)) 27, 30 and 34; 87-1 ((1)) 2, 2A, 5 and 6. Ms. Gibb moved that the Board of Zoning Appeals adopt the following resolution:

WHEREAS, the captioned application has been properly filed in accordance with the requirements of all applicable State and County Codes and with the by-laws of the Fairfax County Board of Zoning Appeals; and

WHEREAS, following proper notice to the public, a public hearing was held by the Board on July 11, 2006; and

WHEREAS, the Board has made the following findings of fact:

1. The applicant is the owner of the land.
2. The four or five issues of concern were

thoroughly briefed by both sides and there was sufficient time to review the well-documented information submitted from either side.

3. The citizens' concern about the wetland issue is appreciated, but the Corp of Engineers had passed on it, and they are entrusted to have property looked at it.
4. The Department of Public Works and Environmental Services (DPWES) has passed on it, and there probably will be another review and a number of iterations on it by the County.
5. The outfall issue is a concern for all in Fairfax County, and DPWES has adopted stringent new standards to determine and figure outfalls, and there are many engineers working on it, which should address the neighbors' concerns.
6. The church will be held accountable and must monitor its stormwater management system and rain gardens.
7. The traffic issue is a problem especially on Sundays, and one sympathizes with the neighbors, but a community church has the right to exist.
8. The County's expert traffic engineer, Angela Rodeheaver, performed traffic counts; her Department thoroughly assessed it; the determinations were passed on; and although the situation is not ideal, there are other areas in Fairfax County that are not ideal on Sundays; it is part of the County's urbanization.
9. The septic system was thoroughly assessed by a Fairfax County Health Department engineer

expert who testified at length about its functions, capabilities, and reliability. It was noted that there are other larger septic fields functioning for years in the County.

10. The church is tasked with the system's continual monitoring and any possibility of a power outage, and several development conditions were added to address the matter.
11. Although it is a rather subjective view of the proposed expansion's compatibility with the residential surroundings, staff, who are professionals, have determined that it is compatible.
12. New lots were added that will have conservation easements, and the trees cannot be razed. There should be sufficient buffering.
13. It is regrettable that there will be disappointed people regardless of this case's resolution.

AND WHEREAS, the Board of Zoning Appeals has reached the following conclusions of law:

THAT the applicant has presented testimony indicating compliance with the general standards for Special Permit Uses as set forth in Sect. 8-006 and the additional standards for this use as contained in Sect(s). 3-103 and 3-C03 of the Zoning Ordinance.

NOW, THEREFORE, BE IT RESOLVED that the

subject application is APPROVED with the following limitations:

1. This approval is granted to the applicant only, Antioch Baptist Church and is not transferable without further action of this Board, and is for the location indicated on the application 6525 and 6531 Little Ox Road, 10901 Olm Drive, 10915 Olm Drive, 6400 Stoney Road and 6340 Sydney Road and is not transferable to other land.

2. This special permit is granted only for the purpose(s), structure(s) and/or use(s) indicated on the special permit plat prepared by William H. Gordon Associates , Inc., dated January 2006, as revised through June 28, 2006 sheets one (1) through seven (7) and approved with this application, as qualified by these development conditions.

3. A copy of this special permit and the Non-Residential Use Permit (Non-RUP) SHALL BE POSTED in a conspicuous place on the property of the use and be made available to all departments of the County of Fairfax during the hours of operation of the permitted use.

4. This special permit amendment is subject to the provisions of Article 17, Site Plans. Any plan submitted to the Department of Public Works and Environmental Services (DPWES) pursuant to this special permit, shall be in substantial conformance with these conditions.

Minor modifications to the approved special permit may be permitted pursuant to Par. 4 of Sect. 8-004 of the Zoning Ordinance.

5. The maximum number of seats in the main area of worship shall be 1,250.
6. There shall be no worship services in the building located on Lot 6; prior to issuance of a Non-RUP for the new sanctuary, the church pews shall be removed and this building shall be converted to a multipurpose ministry building with ancillary support uses.

7. Parking shall be provided as depicted on the special permit plat. All parking shall be on site. There shall be no overflow parking permitted along adjacent subdivision streets. The applicant shall make all members aware of this restriction. In addition, the applicant will encourage car-pooling among its members and shall designate a person within the church administration to act as a point of contact for neighbors with traffic concerns.

8. Transitional screening shall be modified along all lot lines to permit existing vegetation to satisfy the requirements, but shall be supplemented as shown on the plat, with the following additions:

    - In the event that a storm sewer easement is not required on adjacent Lots 28 and 29, the easement area shown on the plat shall be planted with shrubs along the northern lot line as shown on the Landscape Plan. If an easement is required and obtained to

allow a drainage swale in lieu of a storm sewer pipe, a barrier shall be installed on the subject

property across the cleared area within the plantings, subject to approval of DPWES, on the north side of the barrier to minimize the view of the subject property.

- Transitional screening consisting of a minimum of 25.0 feet in width shall be provided on the southern edge of the proposed septic drainage, along Little Ox Road to shield the view of the parking area and buildings from the road.

Notwithstanding that which is shown on the plat, the extent of tree preservation shall be the greatest extent possible on-site, as determined by the Urban Forest Management (UFM), DPWES, and supplemental plantings over and above that which is shown on the plat as determined by UFM. The size, species and location of all supplemental and transitional screening plantings shall be determined in consultation with UFM and shall provide at a minimum Transitional Screening 1 along the northern and southern lot lines of Lot 2 and 2A and the northern lot lines of Lots 5 and 34.

A tree preservation plan shall be submitted to the UFM for review and approval at the time of site plan review. This plan shall designate, at a minimum, the limits of clearing and

grading as delineated on the special permit plat in order to preserve to the greatest extent possible individual trees or tree stands that may be impacted by construction.

All trees shown to be preserved on the tree preservation plan shall be protected by tree protection fencing a minimum of four feet in height to be placed at the dripline of the trees to be preserved. Tree protection fencing in the form of a four foot high 14 gauge welded wire fence attached to six foot steel posts driven

18 inches into the ground and placed no further than ten feet apart, shall be erected at the final limits of clearing and grading and shown on the erosion and sediment control sheets. Tree protection fencing shall only be required for tree save areas adjacent to clearing and grading activities. The tree protection fencing shall be made clearly visible to all construction personnel. The fencing shall be installed prior to any construction work being conducted on the application property. A certified arborist shall monitor the installation of the tree protection fencing and verify in writing that the tree protection fence has been properly installed. Three days prior to commencement of any clearing and grading. UFM shall be notified and given the opportunity to inspect the site

to assure that all tree protection devices have been correctly installed.

9. Foundation plantings and shade trees shall be provided around the church building to soften the visual impact of the structures. The species, size and location shall be determined in consultation with UFM.
10. The barrier requirement shall be waived, except for Lot 6 and as qualified by these conditions.

11. Interior and peripheral parking lot landscaping shall be provided, at a minimum, in conformance with the requirements of Article 13 of the Zoning Ordinance. Size, species and number of all plantings shall be determined in consultation with UFM, at the time of site plan review.

12. The limits of clearing and grading shall be no greater than as shown on the SP Plat or as modified by these conditions and shall be strictly adhered to. A grading plan which establishes the final limits of clearing and grading necessary to construct the improvements shall be submitted to UFM, for review and approval. Prior to any land disturbing activities, a

pre-construction conference shall be held

between DPWES, including UFM, and

representatives of the applicant to include the construction site superintendent responsible for the on-site construction. In no event shall any area on the site be left denuded for a period longer than 14 days except for that portion of the site in which work will be continuous beyond 14 days.

13. Stormwater Management and Best Management Practices facilities shall be provided as determined by DPWES. Low Impact Design (LID) facilities shall be provided as described on the plat, and as approved by DPWES. The underground Stormwater Management/Best Management Practices facility may be reduced in size or removed if it is determined by DPWES that the LID facilities can adequately accommodate storm water volume and quality requirements. The applicant shall enter into an agreement with DPWES, in such a form as required by DPWES, at the time of site plan approval that sets forth a maintenance schedule and procedure for the underground detention facility.

14. Right-of-way dedication shall be provided as depicted on the plat or as determined by the Department of Transportation and the Virginia Department of Transportation (VDOT). The right-of- way shall be dedicated for public street purposes and shall convey to the Board of Supervisors in fee simple on demand or at the time of site plan approval, whichever occurs first.

15. Any proposed lighting shall be provided in accordance with the Performance Standards contained in Part 9 (Outdoor Lighting Standards) of Article 14 of the Zoning Ordinance. Outdoor lighting fixtures shall not exceed twelve (12) feet in height from the ground to the highest point of the fixture, shall be of low intensity design and shall utilize full cut-off fixtures which focus directly on the subject property. Parking lot lighting shall be turned off one-half hour after any event held at the church. Outdoor building-mounted security lighting shall be shielded to prevent off-site glare.

16. The applicant shall obtain a sign permit for the proposed sign, which shall comply with the provisions of Article 12 of the Zoning Ordinance.

17. The applicant shall exercise diligent attempts as determined by VDOT to abandon Stoney Road, where it bisects the subject application property, subject to approval of VDOT. Should the abandonment be approved, the applicant shall scarify the existing road pavement and re-vegetate the area, while allowing unimpeded pedestrian traffic from Lot 6 to the adjacent application properties. The applicant shall scarify and re-vegetate the roadway in accordance to procedures approved by UFM.

18. In order to ensure safe and expedient access to and from the church during Sunday morning church services, the applicant shall provide police assistance for traffic control. The police shall direct traffic at the main entrance to the Church. Additionally, the applicant shall install directional signs on site to assist motorists entering and existing the property.

19. The dwelling on Lot 27 shall be used only as a residence and occupied only by an employee or member of the church and his/her family,

20. The proposed septic drainfield shall be subject to review by the Fairfax County Health Department. Groundwater mounding and nitrate loading calculations shall be conducted and

shall meet the required standards of the County and the State. Groundwater monitoring wells shall be provided in the areas shown on the special permit plat or in areas designated by the County, Pretreatment of effluent shall be provided. Finally, an equalization tank shall be utilized to mitigate peak flows. If the proposed septic drainfield cannot accommodate the application proposal,

the applicant shall be required to apply for a special permit amendment

21. If determined necessary by VDOT at the time of site plan approval, to provide storage capacity, the applicant shall design and construct a left turn lane on Little Ox Road, within the existing right-of-way, into the main entrance of the property.

22. The applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase II and/or Phase III Archaeological Study on only those areas of the application property identified for further study by CRMPS. The studies shall be conducted by a qualified archaeological professional approved by CRMPS, and shall be reviewed and approved by CRMPS.

23. The applicant will have septic field monitoring reports prepared by an independent consultant approved by Fairfax County Department of Health. Said monitoring reports shall be

prepared in writing by the consultant and submitted to the Health Department on a monthly basis for a period of two years

commencing on the issuance of the occupancy permit for the new sanctuary. Thereafter, monitoring reports will be submitted periodically as required by the Health Department.

24. The applicant shall notify the Health Department immediately when the septic system exceeds capacity or fails.

25. In the event of failure of the septic system, the applicant shall discontinue its operations immediately until it can bring the septic system into compliance with applicable Health Department standards and obtain the approval of the Health Department before resuming operations.

26. The building construction shall be generally consistent with the architecture presented in the revised concept elevation in the staff report (Attachment 1). The building will utilize residential type materials such as brick, siding, and asphalt shingles or metal roof or other building material, residential in character, to complement the surrounding community. The design shall incorporate elements such as hip roofs in segmented masses so as to reduce the apparent scale.

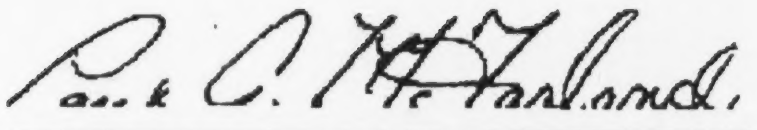
These conditions supersede all previous conditions. This approval, contingent on the above-noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or

adopted standards. The applicant shall be responsible for obtaining the required Non-Residential Use Permit through established procedures, and this special permit shall not be valid until this has been accomplished.

Pursuant to Sect,8-015 of the Zoning Ordinance, this special permit shall automatically expire, without notice, thirty (30) months after the date of approval unless construction has commenced and been diligently prosecuted. The Board of Zoning Appeals may grant additional time to establish the use if a written request for additional time is filed with the Zoning Administrator prior to the date of expiration of the special permit. The request must specify the amount of additional time requested, the basis for the amount of time requested and an explanation of why additional time is required.

Mr. Ribble seconded the motion, which carried by a vote of 4-3. Mr. Beard, Mr. Byers, and Mr. Ribble voted against the motion.

A Copy Teste:



Paula A. McFarland, Deputy Clerk
Board of Zoning Appeals

ATTACHMENT 1

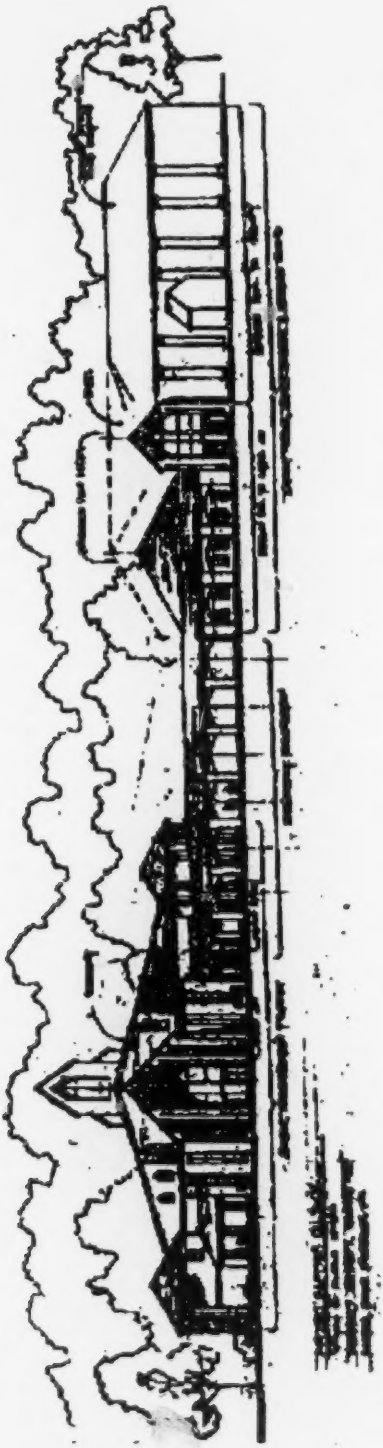


Exhibit B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAMES JACKSON, et al,)

Petitioners)

v.) Case No. CL2006-10122

BOARD OF ZONING APPEALS,)

Respondent)

ORDER

THIS MATTER came on this day to be heard upon the pleadings filed, the brief of the parties, a hearing on the merits, and argument of counsel; and

IT APPEARING to the Court that the Petition should be denied, that there were no erroneous principles of law applied by the Board of Zoning Appeals of Fairfax County in the

approval of the subject Special Permit, SPA 90-S-057-3, nor is the decision plainly wrong and in violation of the purpose and intent of the Zoning Ordinance; it is, hereby

ADJUDGED, ORDERED and DECREED that the decision of the Board of Zoning Appeals of July 11, 2006 in SPA 90-S-057-3 is affirmed; and

THIS ORDER IF FINAL.

7-19-2007

Entered

JUDGE

WE ASK FOR THIS: Reed Smith LLP

By: _____

Grayson P. Manes (VSB # 6614)
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22042
Telephone: 703-641-4292
Facsimile: 703-641-4340

E-Mail: ghanes@reedsmith.com
Counsel for Intervener
The Trustees of Antioch Baptist Church

_____

Elizabeth D, Whiting (VSB # 15452)
241 Edwards Ferry Road, N.E.
Leesburg, VA 20176
Counsel for the Clerk of the Board of Zoning
Appeals and James R. Hart

SEEN & OBJECTED TO:

_____

Gary S. Pisner (VSB 30692) 6439 Little Ox Road
Fairfax Station, VA 22039 Telephone: 703-220-1432
Facsimile: 703-842-5340 E-Mail: gpisner@aptcs.com
Counsel for the Petitioners

resolution of that question unreasonable. Transportation. This document, which I believe starts at -- Is it 424 of the record, sir?

MR. HANES: That's correct, sir.

THE COURT: It is really persuasive on that issue. I thought that was handled really well by the Respondent in that, in fact, the traffic has decreased dramatically with the improvement of Route 123. Also the plan as approved by the BZA takes into account whether or not Stoney Road is going to be abandoned. I don't think there is any question but that the special permit is in harmony with the neighboring

properties.

With respect to procedure, Petitioner cites the Goldberg case. I am told that case has been limited in its terms to Social Security rights by subsequent decisions. But that issue aside, I think your reliance is misplaced, because this clearly is a legislative hearing. And the due process in a legislative hearing, I think, is quite well set out in McIntyre versus Plunkett, 250 Va 27. You have a right to notice, you have a right to opportunity to be heard, and you have a right to a decision. There is no right to cross examine, there is no right to object to the

Exhibit D

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

J AMES JACKSON, et ah	)	
	)	
Petitioners,	)	
	)	
v.	)	CL
No.: 2006-10122		
	)	
BOARD OF ZONINC APPEALS, et al,	)	
	)	
	)	
Respondents.	)	
	)	

ORDER

THIS MATTER CAME ON the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007; it is therefore

ADJUDGED, ORDERED and DECREED that the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007 is denied.

ENTERED THIS 17 DAY OF Aug, 2007

C. J. Maxfield

Judge Charles J, Maxfield

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF HIE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

Exhibit E

Wednesday 20th February,2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
Patricia L. Harrington, Clerk

By:
Deputy Clerk

Exhibit F

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of April, 2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 20th day of February, 2008 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:
Patricia L. Harrington, Clerk

By: original order signed by a
deputy clerk of the Supreme Court
of Virginia at the direction of the Court

Deputy Clerk

124

(2)

No. 08-922

In The
Supreme Court of the United States

JAMES JACKSON, *et al.*,
Petitioners,

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grayson P. Hanes
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Counsel for Respondents
The Trustees of the
Antioch Baptist Church

March 26, 2009

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioners improperly cite 28 U.S.C. § 1254(1). Respondents deny that this Court has jurisdiction to hear this matter. The decision below was based on issues of Virginia law, and the federal question was not decided because neither the Circuit Court nor the Virginia Supreme Court had jurisdiction under Va. Code § 15.2-2314 to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision.

STATEMENT OF THE CASE

The Respondents Trustees of the Antioch Baptist Church (the "Church") are the owners of property located in a residential district in Fairfax County, Virginia upon which they currently operate a church. The petitioners, except for Fairwood Acres Citizens Association (the "Association"), are the owners of property in the general vicinity of the Church (collectively with the Association, the "Residents")[1]. The Church disputes the standing of the Association to make the federal Constitutional claims.

The Residents are asking this Court to find that Article 7, Chapter 22, Title 15.2 of the Code of Virginia (the "Zoning Statute"), as implemented by the Board of Supervisors of Fairfax County, Virginia (the "Board") in Chapter 112 of the 1976 Code of the County of Fairfax, Virginia (the "Zoning Ordinance"

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[1] One of the petitioners, Gary Steven Pisner, is the attorney for the petitioners.

or "ZO") is unconstitutional because the prescribed procedure for local governing bodies to take legislative action to review and approve certain land use applications violates their due process rights under the Fourteenth Amendment to the United States Constitution. The Residents further contend that the resolutions of local governing bodies approving such land use applications violate the Bill of Attainder prohibition of Article I, Section 10 of the United States Constitution. The Statement of the Case in the Petition misstates the statutory structure and the process under review. Accordingly, the Church has included a preliminary discussion of the statutory framework in its Statement of the Case.

I. THE STATUTORY FRAMEWORK.

Pursuant to the Zoning Statute, the Virginia General Assembly delegated to the governing bodies of counties the power to enact local zoning ordinances. Pursuant to the Zoning Statute, the Board as the local governing body of Fairfax County, Virginia (the "County") amended and reenacted the comprehensive Zoning Ordinance on June 12, 1978, effective on August 14, 1978. Section 15.2-2308(A) of the Zoning Statute requires every locality that has enacted a zoning ordinance to establish a board of zoning appeals and further provides that such board may "make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth." Accordingly, pursuant to ZO Sect. 19-202, the Board established the Board of Zoning Appeals ("BZA") to perform the duties provided in the Zoning Statute,

and those duties are set forth in ZO Sect. 19-209. (App. 42a, 44a - 46a) The BZA adopted By-laws on June 24, 1969, as revised.

The Zoning Statute includes the right of governing bodies to issue special exceptions in Section 15.2-2286(3) (App. 50a), as well as the power to delegate that right to a board of zoning appeals in Section 15.2-2309(6). (App. 53a – 54a) Accordingly, when the Board adopted the Zoning Ordinance, it retained in the Board the power to grant special exceptions and delegated the power to grant special permits to the BZA. Section 15.2-2201 of the Zoning Statute defines a "special exception" as "a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." As stated in ZO Sect. 8-001, the special permit uses are of the same nature as the uses permitted by special exception. Pursuant to ZO Sect. 8-002 (App. 38a), the Board authorized the BZA to approve the establishment of those uses that are expressly listed as special permit uses in a particular zoning district on the condition that said use complies with all of the applicable standards and requirements of the Zoning Ordinance, including the general standards set forth in Sect. 8-006 (the "General Standards"). (App. 39a - 40a) The Zoning Ordinance provides that churches, chapels, temples, synagogues and other such places of worship are a Group 3 special permit use in all residential districts in the County. Accordingly, any church seeking to locate in a residential district must first obtain approval of a special permit from the BZA. Any existing church that seeks to modify,

expand or relocate its building must first receive approval of an amendment to its special permit from the BZA.

Although the Residents refer to a special permit throughout the Petition, their procedural argument is fundamentally flawed because it is based upon the statutory provisions for approval by the BZA of a variance pursuant to § 15.2-2309(2) not a special permit pursuant to § 15.2-2309(6). A variance is defined in § 15.2-2201 as "a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner....It shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning." The BZA acts in a different capacity and applies different standards when it approves a variance than it does when it approves a special permit. *See* discussion *infra* Part I.A. Therefore, the Residents' specific reference to the variance provisions under § 15.2-2309(2) of the Virginia Code on pages 3, 4 and 8 of the Petition is erroneous and grossly misleading. (App. 51a-53a)

Sections 15.2-2309(6) and 15.2-2310 (App. 53a – 54a, 55a) of the Zoning Statute provide that no special exception shall be authorized by the board of zoning appeals except after notice and hearing as provided by § 15.2-2204. Section 15.2-2204 requires a public hearing preceded by a published advertisement in a local newspaper of a descriptive summary of the proposed action and actual service of

the notice upon "all abutting property and property immediately across the street or road from the property affected." (App. 47a – 49a) The Board adopted ZO Sect. 18-110 that implemented the notice requirements of Section 15.2-2204 and included an additional requirement that the subject property be posted with information regarding the public hearing, the nature of the application and where further information on the application may be obtained. The Board further adopted ZO Sect. 18-109 that included the following requirements:

> 1. No public hearing shall be held unless the required notice for same has been satisfied in accordance with the provisions of Sect. 110 below.
>
> 2. All hearings shall be open to the public. Any person may appear and testify at such hearing, either in person or by an authorized agent or attorney.

Accordingly, approval of an application for a special permit or an amendment thereto is subject to the process required by the Zoning Statute, a public hearing by the BZA upon actual and constructive notice as implemented by the Zoning Ordinance.

II. THE SPECIAL PERMIT APPLICATION SUBMITTED BY THE CHURCH TO THE BZA.

On April 18, 2006, staff of the Zoning Evaluation Division, Department of Planning and Zoning ("Staff") accepted for review and processing on behalf of the BZA the application filed by the

Church to amend Special Permit 90-S-057 (the "Application") as depicted on the special permit amendment plat. Staff assigned the number SPA 90-S-057-3 to the Application. The Church currently operates a church on a portion of the Application property, pursuant to a Special Permit (SP 90-S-57)(the "Special Permit") granted to it by the BZA in 1990. Since that date, the Church had expanded in membership to the point that it had outgrown the facilities approved in 1990. Because of the need for larger facilities, the Church filed the Application to amend the Special Permit to subject additional land to the Special Permit and to construct a new sanctuary and other facilities.

III. CONSIDERATION OF THE APPLICATION BY THE BZA.

On July 11, 2006, the BZA held a public hearing (the "Hearing") on the Application pursuant to ZO Sect. 19-205. (App. 43a) At the Hearing, the BZA considered the report prepared by Staff dated July 3, 2006 (the "Staff Report") previously distributed to them. (R.151-212)[2] The Staff Report addressed compliance of the Application with the requirements of each element of the General Standards and the additional standards for Group 3 Special Permit uses set forth in ZO Sect. 8-303. (App. 41a) Appended to the Staff Report were the memoranda from the various County agencies that had reviewed the Application. Staff concluded in the Staff Report "that the subject application is in harmony with the Comprehensive Plan and in

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[2] References to "R" are to the certified record of the BZA proceedings.

conformance with the applicable Zoning Ordinance provisions with the implementation of the Proposed Development Conditions contained in Appendix 1 of the Staff Report." The Staff recommended approval of the Application subject to the Proposed Development Conditions. (R. 176)

At the Hearing the BZA heard the presentation of counsel on behalf of the Church as well as the supporting testimony of various members of the Church. The BZA also received comments and exhibits from twenty-five members of the community, including many of the Residents, and actively responded to their statements and questioned many of them to clarify any points of concern. Where speakers posed concerns particular to their property, the BZA members questioned them to determine if the concerns were valid. The community comments were highly generalized grievances with conclusory determinations. Throughout the Hearing, the community speakers did not direct the BZA to any documentation in the record prepared by pertinent experts upon which they could rely to counter the expert analysis of County staff and the Church. There was no evidence of "significant loss of property values" as the Residents contend in the Petition. Mary Rosato, one of the Residents, stated that she was a licensed realtor and that the proposed expansion would "affect property values." (R. 554) She did not provide any evidence to support that statement and did not even state how the values would be affected. The Residents submitted no other testimony regarding the valuation issue. To the contrary, Toni Townes, a member of the Church, addressed the

BZA regarding her personal experience of owning a home within the vicinity of three churches. She stated that the value of her property had doubled over the last ten years as evidenced by the appraisals she received for a home equity loan in 1996 and a line of credit in 2004. (R. 532) No one was denied the opportunity to speak at the Hearing.

At the conclusion of the public comments and after further discussion among the BZA members, a member of the BZA made the motion to approve the Application. She identified and reviewed four issues (wetlands, stormwater outfall, traffic, septic field and compatibility) upon which conflicting comments had been presented in both written submissions and comments. The BZA member stated her factual conclusions in support of the motion to approve the Application. These statements were followed by the legal conclusions regarding compliance of the Application with the General Standards in the Zoning Ordinance. The motion was followed by further discussion by the BZA members which clearly evidenced that the General Standards under the Zoning Ordinance were thoroughly reviewed and considered by the BZA. The BZA approved the Application and adopted the Special Permit Resolution which included twenty-six site specific development conditions governing the use and development of the property as provided by ZO Sect. 8-007. (App. 4a – 24a) Condition Number 4 specifically required the Church to comply with Article 17 of the Zoning Ordinance by obtaining site plan approval from the County Department of Public Works and Environmental Services before commencement of any construction.

IV. THE APPEAL BEFORE THE FAIRFAX COUNTY CIRCUIT COURT.

On August 10, 2006, the Residents filed a Petition for a Writ of Certiorari with the Circuit Court for the County of Fairfax (the "Circuit Court') pursuant to § 15.2-2314 of the Zoning Statute (not § 15.2-2312 as the Residents state) naming only the BZA as a respondent. (App. 56a – 57a) On September 15, 2006, the Circuit Court entered the Writ of Certiorari. On October 10, 2006, the Church filed a Motion to Intervene, which the Circuit Court granted by Order entered November 3, 2006. On January 17, 2007, the Clerk to the BZA transmitted the certified record of the proceeding before the BZA to the Circuit Court. The Residents did not contend either in the petition or before the Circuit Court that notice had not been given or that the Hearing had not been conducted in accordance with the provisions of the Zoning Ordinance and the Zoning Statute. Instead, the Residents contended that they had been denied procedural due process because they were not permitted to confront and to cross examine speakers during the Hearing. In response to preliminary motions filed by the Residents, the Church asserted that under Virginia Supreme Court precedent the Circuit Court did not have jurisdiction to consider the validity or constitutionality of legislation underlying a board of zoning appeals decision in the context of an appeal pursuant to § 15.2-2314. Therefore, it was not proper for the Circuit Court to address the merits of the procedural due process arguments. However, the Circuit Court did not rule upon this issue and allowed the Residents to brief and argue it. The Church also questioned the

standing of the Association to join the petition. Again, the Circuit Court did not rule upon this issue as it was unnecessary to do so because several of the Residents had the requisite standing. As required by Virginia practice and procedure, specifically Rule 3:12 of the Rules of the Virginia Supreme Court, the Residents did not file a motion with the Circuit Court to join the Virginia Department of Game and Inland Fisheries, the owner of Burke Lake, as a necessary or proper party. Instead, the Residents speculate in the Petition that the Circuit Court did not join this entity to the proceeding due to reasons of delay. However, the Circuit Court allowed the Residents to both brief and argue the issues relating to Burke Lake. Prior to the hearing, the Residents submitted a Memorandum to the Circuit Court in which they again asserted that the public hearing procedures mandated by the BZA By-laws denied them procedural due process because they were not allowed to cross examine speakers or object to the testimony of speakers at the public Hearing.

On July 19, 2007, the Circuit Court conducted a hearing on the writ of certiorari as provided in Section 15.2-2314. At the conclusion of the hearing, the Circuit Court rendered its decision finding that the Residents had been afforded the notice and hearing provided under the Zoning Statute and dismissed the petition finding that the BZA acted in a legislative capacity, and the Residents had not directed the court to sufficient evidence in the record to rebut the presumption of correctness afforded the BZA decision under Section 15.2-2314. (App. 27a – 35a) The Circuit Court entered the Order on July 19, 2007 (the "Order"). (App. 2a – 3a) On August 9,

2007, the Petitioners filed a Request for Reconsideration of the Order, in which they asked the Circuit Court to reexamine the due process issue asserting for the first time that if the BZA acted in a legislative capacity when approving the Application, then the act was a bill of attainder in violation of the United States Constitution, citing to article 1, section 10, clause 1, *a fortiori*, the BZA must have been acting in a quasi- judicial capacity. The Circuit Court denied the Request for Reconsideration by order entered August 17, 2007. (App. 26a)

V. THE PETITION FOR APPEAL TO THE VIRGINIA SUPREME COURT.

On August 23, 2007, Petitioners filed a notice of appeal with the Virginia Supreme Court and on October 19, 2007, filed the Petition for Appeal. The Residents contended in the petition that the BZA Hearing was a quasi-judicial hearing. Therefore, they were denied procedural due process (without citation to either the Virginia or United States Constitutions) because they were not permitted to cross examine speakers at the public Hearing. Alternatively, they argued that if the BZA hearing were a legislative hearing, then the "decision is a bill of attainder and thus unconstitutional" without citation to either the Virginia or United States Constitutions. The Church filed a Brief in Opposition to Petition for Appeal in which it contended that the BZA hearing was conducted in conformance with the Zoning Statute and that the Circuit Court correctly declined to consider the constitutional issues because it did not have jurisdiction to do so under controlling Virginia

Supreme Court precedent. On February 20, 2008, the Virginia Supreme Court denied the Petition for Appeal without opinion. (App. 1a) On March 5, 2008, the Petitioners filed a Petition to Rehear in which they again asserted that the BZA Hearing was quasi-judicial which required procedural due process (without citation to either the Virginia or United States Constitutions) and, alternatively, that if the BZA acted in a legislative capacity then "its decision is a bill of attainder and thus unconstitutional" without citation to either the Virginia or United States Constitutions. The Virginia Supreme Court denied the Petition to Rehearing without opinion on April 25, 2008. (App. 25a)

REASONS FOR DENYING THE PETITION

I. THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE PETITION BECAUSE THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO CONSIDER CHALLENGES TO THE UNDERLYING ZONING ORDINANCE OR ZONING STATUTE IN A WRIT OF CERTIORARI PROCEEDING CONDUCTED PURSUANT TO § 15.2-2314.

A. The Board of Zoning Appeals Acted in a Legislative Capacity When It Approved the Special Permit.

The Residents contended throughout the proceeding before the Circuit Court and upon appeal to the Virginia Supreme Court that the BZA Hearing was quasi-judicial. Therefore, procedural due

process required judicial type procedures. This assertion is contrary to longstanding Virginia Supreme Court precedent which holds that the BZA acts in a legislative capacity when it considers applications for special permits. In *National Memorial Park, Inc. v. Bd. of Zoning Appeals of Fairfax County*, 232 Va. 89, 92, 348 S.E.2d 248, 249-50 (1986), the Virginia Supreme Court summarized the legal principles applicable to the special permit process under the Zoning Statute, as follows:

> The decision to grant or deny a special use permit is a legislative, not an administrative function. *Bollinger v. Roanoke County, 217 Va. 185, 186, 227 S.E.2d 682, 683 (1976)*; *Byrum v. Orange County, 217 Va. 37, 41, 225 S.E.2d 369, 372 (1976)*; *Civic Assoc. v. Chesterfield County, 215 Va. 399, 401-02, 209 S.E.2d 925, 927 (1974)*. Moreover, a legislative act is presumed to be valid, and the party challenging the action has the burden of rebutting the presumption. *Fairfax County v. Southland Corp., 224 Va. 514, 522-23, 297 S.E.2d 718, 722 (1982)*; *City of Richmond v. Randall, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975)*; *Fairfax County v. Snell Corp., 214 Va. 655, 658, 202 S.E.2d 889, 892-93 (1974)*; *Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959)*. This is true whether the special use decision is made by the legislative body or pursuant to a delegation of power to a

> board of zoning appeals. *See Civic Assoc., 215 Va. at 401-02, 209 S.E.2d at 927.*
>
> A decision by a board of zoning appeals based upon correct principles of law is presumed correct and will not be disturbed on appeal unless plainly wrong or in violation of the purpose and intent of the zoning ordinance. *Bd. of Zoning App. v. O'Malley, 229 Va. 605, 608, 331 S.E.2d 481, 483 (1985); Bd. of Zoning App. v. Bond, 225 Va. 177, 179-80, 300 S.E.2d 781, 782 (1983); Packer v. Hornsby, 221 Va. 117, 120, 267 S.E.2d 140, 141 (1980); Alleghany Enterprises v. Covington, 217 Va. 64, 67, 225 S.E.2d 383, 385 (1976).* Zoning boards must exercise their expertise and discretion when making decisions on proposed special uses. Consequently, judicial interference is permissible only if the Board's action is arbitrary and capricious, constituting a clear abuse of its discretion. *O'Malley, 229 Va. at 608, 331 S.E.2d at 483; Board of Zoning Appeals v. Fowler, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960).*

The Virginia Supreme Court has restated and reaffirmed these principles in numerous subsequent decisions. *See also Bd. of Supervisors of Rockingham County v. Stickley*, 263 Va. 1, 556 S.E.2d 748 (2002); *County of Lancaster v. Cowardin*, 239 Va. 522, 391

S.E.2d 267 (1990); *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990)(standards of review of use-permit cases same as those governing zoning enactments); *County Bd. of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989)(same set of rules for reviewing use-permit cases as those governing rezoning cases). "The terms 'special exception' and 'special permit' are interchangeable." *Bd. of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721 (1982). Accordingly, the Circuit Court correctly held that the Hearing was not quasi- judicial and that the BZA acted in a legislative capacity when it approved the Application.

The statement in the Petition that boards of zoning appeals are "legislative entities" and "legislative bodies" is inaccurate and misleading. Under the Zoning Statute, a variance application and a special permit application are separate and distinct processes. The board of zoning appeals acts within a different scope of authority when approving a variance as opposed to a special permit. The Virginia Supreme Court explained the different functions in *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004). "The BZA, when considering an application for a variance, acts only in an administrative capacity." *Id.* at 765, 594 S.E.2d at 576. "By contrast, when the BZA considers applications for special exceptions or special use permits, it acts in a legislative capacity and its decision must be sustained if the record shows the issue to be 'fairly debatable.'" *Id.* at 765 n.2, 594 S.E.2d at 577 n.2.

The statement on page 6 of the Petition that "one of the functions of these Zoning Boards is to approve special zoning permits to build building[s], to modify uses of existing building[s], and to modify the uses of properties, by legislatively modifying local zoning ordinances" applies to applications for a variance.[3] The special permit process is not a "mechanism...designed to permit an application to deviate from Fairfax County's zoning restrictions" as the Residents contend on page 24 of the Petition, again a reference to a variance request. It is simply a process to locate or expand a use that is specifically enumerated as one of the special permit uses that may be allowed in a particular zoning district with prior BZA approval. The proceeding before the BZA was an Application for a Special Permit amendment. The Church did not file an application for a variance from the terms of the Zoning Ordinance, nor did the BZA grant a variance from the terms of the Zoning Ordinance. Accordingly, the BZA approved the Special Permit acting in its legislative capacity not in a quasi-judicial capacity as the Residents contend.

B. Since the Board of Zoning Appeals Acted in a Legislative Capacity When it Approved the Application, the Circuit Court Correctly Held That the Residents Were Only Entitled to the Procedural Requirements of the Zoning Statute.

Since the Residents had no probative evidence in the record upon which they could rely to rebut the presumption of correctness afforded the BZA decision, (see discussion *infra* Part IV), they

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[3] A change in use of a property requires an application for rezoning or conditional rezoning.

mounted an attack on the underlying process required by the Zoning Statute for approval of special exceptions/special permits. Based upon their flawed contention that the BZA acted in a quasi-judicial capacity when it considered the Application, the Residents urged the Circuit Court to reverse the BZA and to impose judicial type procedures upon the BZA, such as the right of cross examination. The Residents alleged that they were denied due process because they were not permitted to take discovery of County staff and to confront and cross examine speakers, including the BZA members themselves, during the Hearing. In support of that argument, the Residents cited this Court's decisions in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (administrative procedures for termination of Social Security disability payments) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (administrative procedure for termination of welfare benefits). However, in accordance with Virginia Supreme Court precedent, the Circuit Court held that reliance on these cases was misplaced because the BZA hearing was legislative not administrative. The Circuit Court did not otherwise specifically address the federal Constitution.

Citing *McManama v. Plunk, Adm'x*, 250 Va. 27, 458 S.E.2d 759 (1995), which involved application of the due process provisions of the Constitution of Virginia, Article 1, § 11, the Circuit Court found that the procedural due process guarantees of reasonable notice and an opportunity to be heard had been satisfied, which was all that the Zoning Statute, as implemented by the Zoning Ordinance, required. *See Schilling v. Bedford County Mem'l Hosp., Inc.*, 225 Va. 539, 543 n.2, 303

S.E.2d 905, 907 n.2 (1983)(courts in Virginia rely on Virginia Constitution rather than resorting to that of the United States); *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 222 Va. 574, 588, 281 S.E.2d 915, 922 (1981)(Virginia courts look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians). The Circuit Court further found that "[t]here is no right to cross examine, there is no right to object to the testimony of the people that are testifying. And I would note that in this case, in addition to those rights, there was the right, apparently, to submit evidence prior to the hearing, because that, in fact, happened." (App. 33a – 34a) The Circuit Court declined to add procedural requirements not found in the Zoning Statute or to consider the constitutionality of the underlying procedural requirements in the Zoning Statute or the Zoning Ordinance. The Order subsequently entered by the Circuit Court did not address the due process issue and affirmed the decision of the BZA making the two findings required by § 15.2-2314:

> 1. The BZA did not apply erroneous principles of law in its approval of the Special Permit; and
>
> 2. The BZA decision was not plainly wrong and did not violate the purpose and intent of the Zoning Ordinance.

(App. 2a).

In their Request for Reconsideration of the Order, the Residents asked the Circuit Court to reexamine the due process issue asserting for the first time that if the BZA acted in a legislative capacity when approving the Application, then the act was a bill of attainder in violation of the United States Constitution, citing to article 1, section 10, clause 1, *a fortiori*, the BZA must have been acting in a quasi judicial capacity. The Circuit Court denied the request. (App. 26a)

C. The Federal Question at Issue Was Not Decided by the Circuit Court or the Virginia Supreme Court Because Neither Court Had Jurisdiction in a Proceeding on a Writ of Certiorari Under Section 15.2-2314 to Consider Due Process or Bill of Attainder Challenges to the Zoning Statute.

The essence of the Residents' due process and bill of attainder argument is a federal Constitutional challenge to the notice and public hearing procedure required by the Zoning Statute for the approval of special exceptions/special permits by a local governing body or board of zoning appeals. However, the Circuit Court did not address the due process issue beyond confirming that the required statutory procedure had been followed because such consideration was not within the limited scope of its jurisdiction under Section 15.2-2314.

The proceeding on a writ of certiorari under § 15.2-2314 is not a trial de novo. *Packer v. Hornsby*, 221 Va. 117, 120, 267 S.E.2d 140, 141 (1980). In *Bd. of Zoning Appeals of Fairfax County v. Bd. of Supervisors of Fairfax County*, 275 Va. 452, 457, 657

S.E.2d 147, 149 (2008), the Virginia Supreme Court held that a proceeding filed pursuant to § 15.2-2314 of the Zoning Statute is a proceeding in the nature of an appeal, not a trial proceeding, finding that:

> The language of *Code § 15.2-2314* demonstrates that a proceeding filed pursuant to this section has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance....Furthermore, the section limits the circuit court's disposition authority. The circuit court may 'reverse or affirm, . . . or may modify the decision brought up for review.' *Code § 15.2-2314.* This limitation on the circuit court's disposition authority along with the description of the court's action as 'reviewing' the decision of the BZA, indicates that the legislature considered the proceeding as a form of appellate review, rather than a proceeding resolving the issue in the first instance.

This holding is consistent with the Virginia Supreme Court precedent regarding the limited disposition authority of the circuit court in a certiorari proceeding.

In *Bd. of Zoning Appeals v. University Square Associates*, 246 Va. 290, 294-95, 435 S.E.2d 385, 388 (1993), the Virginia Supreme Court held that, "the certiorari process does not authorize a trial

court to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision....Rather, the trial court's review is limited to determining whether the decision of the board of zoning appeals is plainly wrong or is based on erroneous principles of law." (citing *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E.2d 727, 732-33 (1987)). *See also City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002) (limited standard of review of certiorari process does not authorize trial court to rule on validity or constitutionality of legislation underlying a board of zoning appeals decision); *Adams Outdoor Advertising, Inc. v. Bd. of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 416, 544 S.E.2d 315, 320 (2001) (review of decision of a BZA on a petition for writ of certiorari is limited to the scope of the BZA proceeding and reviewing court may only consider the correctness of the BZA's decision); *Foster v. Geller*, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994) (review of decision of BZA on petition for writ of certiorari is limited to scope of BZA proceeding and reviewing court may only consider correctness of BZA decision applying standard of review provided by statute). Therefore, the Circuit Court properly declined to specifically address the due process challenge to the procedural requirements of the Zoning Statute, as implemented by the Zoning Ordinance and the BZA rules of procedure, because consideration of constitutional issues was beyond the scope of review authorized by § 15.2-2314.

This decision was also in accord with prior determinations by the Circuit Court and other

circuit courts in the Commonwealth that have similarly declined to consider due process challenges in certiorari proceedings. *See Kebais. v. Bd. of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37, *18 (2004) ("Given the precedent set forth by the Supreme Court of Virginia, a Circuit Court is without jurisdiction to rule on the validity or constitutionality of legislation underlying a BZA decision."); *Roberts v. Bd. of Zoning Appeals of Madison County*, 64 Va. Cir. 397, 400 (2004) (Virginia Supreme Court precedent "prohibits the court from even addressing whether the petitioners have any due process property rights" under the applicable limited standard of review). Therefore, the Circuit Court and the Virginia Supreme Court were without jurisdiction to consider the constitutional challenge to the Zoning Statute, as implemented by the Zoning Ordinance. Accordingly, this Court is without jurisdiction to consider the issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, (1998) ("On every writ of error . . ., the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.").

II. THE COURT SHOULD NOT GRANT THE PETITION BECAUSE THE RESIDENTS FAILED TO INVOKE THE PROPER PROCEDURE UNDER VIRGINIA LAW TO CHALLENGE THE UNDERLYING ZONING STATUTE.

The Residents have not met their burden of establishing that the federal claim was properly presented to the Circuit Court because they have

failed to establish that the claim was raised at the time and in the manner required by Virginia law. The Virginia Supreme Court has clearly held that constitutional challenges to the Zoning Statute, as implemented by local zoning ordinances, must be initiated by a direct challenge against the local governing body, i.e., by a writ of mandamus or declaratory judgment. *See Bd. of Supervisors of Fairfax County v. The Southland Corporation*, 224 Va. 514, 297 S.E.2d. 718 (1982); *Bd. of Zoning Appeals v. University Square Associates*, 246 Va. 290, 295 n.2, 435 S.E.2d. 385, 388 n.2 (1993)(challenge to underlying zoning legislation requires direct action against locality); *Norton v. City of Danville*, 268 Va. 402, 408 n.4, 602 S.E.2d 126, 129 n.4 (2004)(challenge to underlying ordinance requires direct action against city council).

None of the pleadings filed by the Residents with the Circuit Court or the Virginia Supreme Court addressed the jurisdiction of the Circuit Court to consider a constitutional due process or bill of attainder challenge to the underlying Zoning Statute in the context of a certiorari proceeding under § 15.2-2314 to which the Board was not a party. In the Brief in Opposition to Petition for Appeal, pp. 23-25, filed in the Virginia Supreme Court, the Church contended that the Circuit Court, and thus that court, did not have jurisdiction to consider constitutional challenges to the underlying Zoning Statute under controlling Virginia Supreme Court precedent. The Residents failed to address that contention either in oral argument before the Virginia Supreme Court or in the Petition to Rehear subsequently filed. Since neither order of the

Virginia Supreme Court addressed the federal questions before the Court, one must assume that the issue was not properly presented. *See Sheets v. Castle*, 263 Va. 407, 412, 559 S.E.2d 616, 619 (2002) ("unless the grounds upon which the refusal is based is discernible from the four corners of the Court's order, the denial [of a petition for appeal] carries no precedential value."). The Residents have not met their burden of defeating this assumption.

On February 5, 1941, the Board, pursuant to the General County Zoning Act of 1938, adopted a comprehensive zoning ordinance which became effective on March 1, 1941. This original zoning ordinance contained the same notice and public hearing procedures at issue in this case. Since that date, the Board and the BZA have been approving special exceptions/special permits in the County while acting in a legislative capacity. In *County of Fairfax v. Parker*, 186 Va. 675, 685, 44 S.E.2d 9, 18 (1947), the Virginia Supreme Court upheld the validity of the Fairfax County Zoning Ordinance to due process challenges under the *Fourteenth Amendment of the Constitution*, finding that "the ordinance under review in *Euclid v. Ambler Realty Co*.....is identical in form with the Fairfax county ordinance here under review." The court further observed that "there is nothing strange or unusual in the form of the Fairfax county ordinance....it is in the usual form which, by inference at least, has been judicially approved time and time again." *Id.* 688, 44 S.E.2d at 22.

The Residents are not asking this Court to assess whether the decision of the BZA acting in a

legislative capacity was fairly debatable. They are not contending that the Zoning Ordinance as applied to the facts in this case is both arbitrary and unreasonable; that is, a statute valid as to one set of facts may be invalid as to another. Instead, they are asserting that the procedure established by the Board in 1941 for the review and approval of land use applications in the County is procedurally deficient because it does not comport with their view of the process to which they are entitled under *the Fourteenth Amendment of the United States Constitution.*[4] The Residents are requesting this Court in the first instance to reverse established procedure in the County in the context of an appellate proceeding in which the Circuit Court held only the limited disposition authority prescribed by the statute. The Residents are further asking this Court to overturn longstanding Virginia Supreme Court precedent and to declare the procedural requirements of the Zoning Statute unconstitutional, even though such a challenge has not been commenced by a direct action against the Board as required by Virginia law. Furthermore, the Virginia Supreme Court has not had a fair opportunity to address the federal question asserted in the Petition. *See Adams v. Robertson and Liberty National Life Insurance Co.*, 520 U.S. 83 (1997). The result which the Residents are seeking would have far reaching

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[4] In the Conclusion to the Petition the Residents appear to be morphing their argument into a form of substantive due process challenge alleging that this procedure falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency and asking this Court to render an advisory proclamation to the Virginia General Assembly regarding the remedial legislation necessary to rectify the procedure.

impact not only in the Commonwealth of Virginia but in other states throughout the country which have adopted the same legislative hearing process for approving land use applications in their local jurisdictions. Such a serious question should be considered in the first instance by the Virginia Supreme Court after a federal claim is properly presented to the Circuit Court with the Board properly joined as a party.

III. ALL NECESSARY PARTIES WERE BEFORE THE CIRCUIT COURT.

A. The Virginia Department of Game and Inland Fisheries Was Not a Necessary Party to the Appeal.

As an ancillary due process issue, the Residents contend that the Virginia Department of Game and Inland Fisheries (the "VDGIF"), an agency of the Commonwealth of Virginia and the owner of Burke Lake, was a necessary party. However, the Residents fail to explain why the absence of the VDGIF in the certiorari proceeding adversely impacted the ability of the Circuit Court to review the record of the BZA proceeding. In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 225 Va. 235, 238, 302 S.E.2d 19, 21 (1983), the Virginia Supreme Court held that the only necessary parties to a proceeding under § 15.2-2314 (formerly § 15.1-497) are the aggrieved person and the board of zoning appeals. The court further held that necessary parties could be added after the expiration of the thirty-day period provided by Section 15.2-2314 once the writ of

certiorari was timely filed by an aggrieved party. The necessary party at issue in that case was the applicant before the board of zoning appeals. The court did not discuss the standards for the determination of a necessary party in the context of an appeal under § 15.2-2314 and has not addressed the issue in subsequent decisions. The Residents as the aggrieved persons filed the petition and joined the BZA, the necessary party under the statute. However, the Residents neither included the VDGIF as a party to the petition nor filed a motion pursuant to Virginia Supreme Court Rule 3:12 to join the VDGIF to the proceeding.

As previously discussed *supra* Part I.C., the Virginia Supreme Court has held that a proceeding filed pursuant to § 15.2-2314 is in the nature of an appeal, not a trial proceeding. The circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance. The issue before the Circuit Court was the sufficiency of the record upon which the BZA made its decision approving the Application for the expansion of the church upon its property. The Circuit Court found that there was sufficient evidence in the record regarding the protection of Burke Lake in accordance with the Comprehensive Plan to support the BZA decision. Contrary to the Residents' contention, there was no "oversight" regarding the notice given to the VDGIF. Pursuant to § 15.2-2204(B), the VDGIF was not required to receive actual notice because the VDGIF property does not abut the Church property and is not immediately across the street. *See Lawrence Transfer & Storage Corp. v. Bd. of Zoning Appeals of Augusta County*,

229 Va. 568, 331 S.E.2d 460 (1985). In fact, Burke Lake is located over one mile from the Church. Nevertheless, VDGIF did have actual notice of the Application. Andrew Zadnick, a VDGIF representative, submitted comments regarding the Application on behalf of the VDGIF to the Clerk to the BZA via email dated June 27, 2006 (R. 230). However, neither Mr. Zadnick nor any other representative of VDGIF commented at the BZA Hearing.

Furthermore, the Memorandum submitted to the BZA by the County Park Authority as the steward of Burke Lake (R. 208-210) clearly evidenced its understanding that the impact of the proposed project upon Burke Lake would be fully reviewed during the subsequent site plan process required by the Development Conditions. The Residents misapprehend the land development process in the County. Approval of the Special Permit by the BZA was only the first step in the process. As required by the Zoning Ordinance and Condition Number 4 of the Special Permit, the Church was then required to submit and process a site plan that would be subject to detailed review by County and state agencies for compliance with all applicable local, state and federal environmental laws and regulations.

There is no probative evidence in the record that supports the Residents' assertion that the absence of the VDGIF as a party to the certiorari proceeding barred the consideration of the matter by the Circuit Court or undermined the ability of the Circuit Court to assess the sufficiency of the record

upon which the BZA based its decision. The interests of the VDGIF were not so "bound up" with the interests of the Residents, the BZA and the Church that its legal presence as a party was an "absolute necessity, without which the [circuit] court [could not] proceed." *Jett v. Degaetani*, 259 Va. 616, 620, 528 S.E.2d 116, 118 (2000) *citing Bonsal v. Camp*, 111 Va. 595, 597-98, 69 S.E. 978, 979 (1911) (*quoting Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 284, 18 L. Ed. 825 (1867)).

The generalized grievances asserted by the Residents in the Petition regarding the effect of the Application upon Burke Lake, including "evidence of significant damage" and the "undisputed fact" that the "proposed construction [would] destroy wetlands and alter and eliminate parts of the watershed," are inaccurate, misleading and not supported by probative evidence in the record.

B. The Residents Do Not Have Standing to Assert the Rights of the Virginia Department of Game and Inland Fisheries.

The Association and the individual Residents do not have standing to assert the rights of third parties who may be adversely affected by the provisions of the Zoning Statute as implemented by the Zoning Ordinance. *See Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 63 168 S.E.2d 117, 120 (1969) ("It is a fundamental principle of constitutional law that one challenging the constitutionality of a statute or ordinance has the burden of showing that he himself has been injured or threatened with injury by its enforcement. It is of no benefit to him

to point out that some other person might conceivably be discriminated against by the provisions of the ordinance."); *County of Fairfax v. Parker*, 186 Va. 675, 680, 44 S.E.2d 9, 11 (1947) ("the appellee is concerned only with [the restrictions] which affect his rights. It does not lie in his mouth to say, nor will he be heard to complain, that the rights of others are adversely affected by the provisions of the ordinance."). The Virginia Supreme Court has recognized that "neighbors who own property or reside adjacent to land subject to [land use applications] ordinarily have interests sufficiently affected to confer upon them standing to challenge the approval of the [land use application] in court...[noting that] the extent to which they are 'aggrieved' may present an issue of fact." *Braddock, L.C. v. Bd. of Supervisors of Loudoun County*, 268 Va. 420, 424 n.1, 601 S.E.2d 552, 554 n.1 (2004). While the individual Residents may satisfy this standard, the Association neither owns nor occupies any real property. No personal or property right of the Association was affected by the BZA While the Association may qualify as a "person" and have the capacity to sue and be sued under Virginia law, the Association has failed to demonstrate that it is "aggrieved." The Association was not an aggrieved party and did not have standing to pursue the appeal to the Circuit Court and does not have standing to join the Petition. Although the individual Residents may have standing to pursue their own interests, the Virginia Supreme Court has held that where "the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons

similarly situated," such a party will not be considered "aggrieved" within the meaning of § 15.2-2314 (formerly § 15.1-497). *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of the City of Virginia Beach*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986) (citing *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972)). Representational standing is not recognized in Virginia unless it is specifically authorized by statute. *See W. S. Carnes, Inc. v. Bd. of Supervisors of Chesterfield County*, 252 Va. 377, 478 S.E.2d 295 (1996). The Zoning Statute does not provide for representational standing. Therefore, neither the Association nor the individual Residents had standing before the Circuit Court to raise issues regarding "the potential financial loss to the community and ... the potential loss to the citizens of Fairfax County and to the Commonwealth of Virginia" and do not have standing to pursue such interests in this Court in the context of a proceeding under Section 15.2-2314.

IV. THE CIRCUIT COURT DID NOT ERR, THE PETITIONERS FAILED IN THEIR BURDEN OF CHALLENGING THE PRESUMPTIVE CORRECTNESS OF THE DECISION BY THE BOARD OF ZONING APPEALS.

Prior to rendering its decision, the Circuit Court cited the standard of review of the BZA decision approving the Special Permit, as enunciated by the Virginia Supreme Court, discussed *supra* in

Part I.A., and now incorporated into the Sixth paragraph of § 15.2-2314,[5] as follows:

> An appeal of a decision of the Board of Zoning Appeals of a special permit - well, the special permit is presumed to be correct. The Plaintiff may rebut the presumption by showing that the BZA, Board of Zoning Appeals, applied erroneous principles of law, or, if it is discretionary, if discretion is involved in the case, the Board of Zoning Appeals was plainly wrong and in violation of the purposes and intent of the Zoning Ordinance.

(App. 28a) Upon completion of its review of the record before the BZA, the Circuit Court held that, "....nothing in the Petitioners' submissions convinces me that the BZA applied erroneous principles of law or was plainly wrong and in violation of the Zoning Ordinance." (App. 34a) The Circuit Court enunciated and applied the correct standard of review under Section 15.2-2314.

The Residents failed to address this standard of review in either the pleadings submitted to the Circuit Court or during the hearing or in the Petition for Appeal filed with the Virginia Supreme Court nor do the Residents address the standard of review in this Petition. The Residents did not cite to specific evidence in the record of the proceedings before the

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[5] The Virginia General Assembly amended and re-enacted § 15.2-2314 in the 2003 Session to incorporate the standard of review enunciated by the Virginia Supreme Court.

BZA where probative evidence had been submitted that surmounted the presumption of reasonableness accorded the BZA decision. The review of the record of the BZA proceeding by the Circuit Court demonstrated that the BZA reviewed and considered each of the issues raised by the Residents. The BZA members actively participated during the course of the hearing and questioned the Church and its agents, Staff, other representatives of County agencies and the Residents on the issues pertinent to its determination that the proposed expansion of the existing use satisfied all of the standards under the Zoning Ordinance.

The issue before the Circuit Court was whether the record of the proceeding supported the BZA decision. The Virginia Supreme Court has framed the issue before the court as, "not who presented the greatest number of expert witnesses or even who won the battle of the experts. Rather, the question is whether there is any evidence in the record sufficiently probative to make a fairly debatable issue" of the BZA's decision to approve the special use permit. *Board of Supervisors v. Stickley*, 263 Va. 1, 11, 556 S.E.2d 748, 754 (2002). *Accord Board of Supervisors v. Robertson*, 266 Va. 525, 536-537, 587 S.E.2d 570, 577-578 (2003). The Circuit Court found that the Residents had not met the initial burden of overcoming the presumption of correctness. Nevertheless, even if we were to assume *arguendo* that the comments and written submissions by the Petitioners to the BZA satisfied this standard, a review of the record supports the finding that there was sufficient evidence of

reasonableness to make the decision fairly debatable.

In reviewing the BZA's decision, the Circuit Court adhered to the standards of review set forth by the Virginia Supreme Court in *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990), which requires a board of zoning appeals to make "a sufficient record....to enable the reviewing court to make an objective determination whether the issue is 'fairly debatable.'" Id. at 348, 389 S.E.2d at 705. The Circuit Court found that the BZA satisfied this standard, and that the decision of the BZA was supported by substantial evidence in the record.

In challenging the approval of the Application, the Residents reiterated to the Circuit Court the same unpersuasive arguments made to the BZA which did not address or satisfy the standard of review. The Residents could not cite to evidence in the record which established that the decision was unreasonable nor did they identify oral or documentary evidence in the record that was entitled to greater weight than the Staff Report and the evidence submitted by the Church. The proceeding before the Circuit Court was replete with the Residents' assertions regarding "false submissions, false testimony, faulty assertions, lack of disclosure by the Applicant, erroneous testimony and false data." These assertions were repeated in the Petition for Appeal to the Virginia Supreme Court and have now been asserted again in the Petition. The Residents did not substantiate any of their assertions.

Article VIII of the By-laws of the BZA provides a procedure for a request for rehearing and reconsideration where a party can establish that the "BZA overlooked or misunderstood a material fact or legal issue which would change the decision sought to be reheard." (App. 36a – 37a) The Residents did not seek a rehearing and reconsideration which is the proper mechanism to raise such issues. Their failure to invoke this procedure was likely due to lack of evidence in the record of the BZA proceeding to support their contentions.

Accordingly, the Circuit Court found that the BZA acted within the scope of its legislative authority when it determined that the Church had satisfied the standards under the Zoning Ordinance for the approval of the Application. Based upon a detailed review of the record of the BZA proceeding and the Residents' submissions, the Circuit Court correctly held that the Residents had not submitted probative evidence that "the BZA applied erroneous principles of law or was plainly wrong and in violation of the Zoning Ordinance." (App. 34a) None of the assertions in the Petition constitute probative evidence sufficient to rebut the presumption of correctness of the BZA decision and certainly do not establish that the BZA had no reasonable basis to approve the Application. Accordingly, the Circuit Court correctly affirmed the BZA based upon the statutory standard of review as applied by the Virginia Supreme Court. If the reasonableness of the legislative determination is fairly debatable, this Court should not "substitute its judgment for that of the legislative body charged with the primary duty and responsibility of

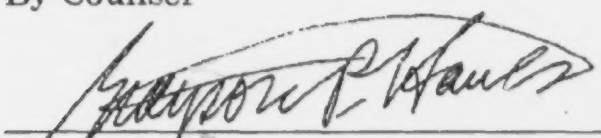
determining the question." *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927). *See also Standard Oil Co. v. City of Marysville*, 279 U.S. 582 (1929); *Gorieb v. Fox*, 274 U.S. 603 (1927); *County of Fairfax v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947).

CONCLUSION AND RELIEF SOUGHT

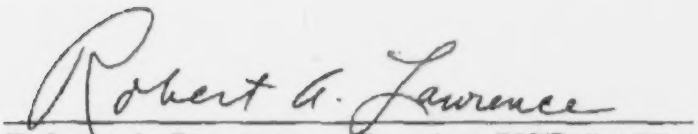
For the foregoing reasons, the Supreme Court of the United States should deny the Petition for Writ of Certiorari filed by the Residents. First, the Court does not have jurisdiction to grant the Petition because the Circuit Court did not have jurisdiction to consider constitutional challenges to the underlying Zoning Ordinance or Zoning Statute in a certiorari proceeding conducted pursuant to Section 15.2-2314. Second, the Residents failed to invoke the proper procedure under Virginia law to challenge the underlying Zoning Statute. Third, all necessary parties were before the Circuit Court. Fourth, the Circuit Court did not err in affirming the decision of the BZA.

Respectfully submitted,
THE TRUSTEES OF
THE ANTIOCH BAPTIST CHURCH

By Counsel



Grayson P. Hanes, Esquire (VSB # 6614)



Robert A. Lawrence, Esquire (VSB # 4974)

Grayson P. Hanes, Esquire (VSB # 6614)
Counsel of Record
Robert A. Lawrence, Esquire (VSB # 4974)
Linda S. Broyhill, Esquire (VSB # 22989)
REED SMITH LLP
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22042
Phone: (703) 641-4200
Fax: (703) 641-4340

APPENDIX

TABLE OF CONTENTS

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 20th *day of* February, 2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Ebby Edwards
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAMES JACKSON, et al.,	)	
Petitioners	)	
v.	)	Case No.
	)	CL 2006-10122
BOARD OF ZONING APPEALS,	)	
Respondent	)	

ORDER

THIS MATTER came on this day to be heard upon the pleadings filed, the brief of the parties, a hearing on the merits, and argument of counsel; and

IT APPEARING to the Court that the Petition should be denied, that there were no erroneous principles of law applied by the Board of Zoning Appeals of Fairfax County in the approval of the subject Special Permit, SPA 90-S-057-3, nor is the decision plainly wrong and in violation of the purpose and intent of the Zoning Ordinance; it is, hereby

ADJUDGED, ORDERED and DECREED that the decision of the Board of Zoning Appeals of July 11, 2006 in SPA 90-S-057-3 is affirmed; and

THIS ORDER IF FINAL.

7-19-2007 /s/ Charles J. Maxfield
Entered , JUDGE

WE ASK FOR THIS:

Reed Smith LLP

By: /s/ Grayson P. Hanes
Grayson P. Hanes (VSB # 6614)
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22042
Telephone: 703-641-4292
Facsimile: 703-641-4340
E-Mail: ghanes@reedsmith.com
Counsel for Intervenor
The Trustees of Antioch Baptist Church

/s/ Elizabeth D. Whiting
Elizabeth D. Whiting (VSB # 15452)
241 Edwards Ferry Road, N.E.
Leesburg, VA 20176
Counsel for the Clerk of the Board of Zoning Appeals and James R. Hart

SEEN & OBJECTED TO:

/s/ Gary S. Pisner
Gary S. Pisner (VSB # 30692)
6439 Little Ox Road
Fairfax Station, VA 22039
Telephone: 703-220-1432
Facsimile: 703-842-5340
E-Mail: gpisner@aptcs.com
Counsel for the Petitioners

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

July 17, 2006

Robert A. Lawrence, Esquire
Reed Smith LLP
3110 Fairview Park Drive
Suite 1400
Falls Church, Virginia 22042

Re: Special Permit Amendment
Application SPA 90-S-057-3
Trustees of Antioch Baptist Church

Dear Mr. Lawrence:

At its July 11, 2006 meeting, the Board of Zoning Appeals took action to **APPROVE** the above-referenced application. A copy of the Resolution is attached.

This action does not constitute exemption from the various requirements of this County and State. The applicant is responsible for ascertaining if permits are required and for obtaining the necessary permits such as Building Permits, Residential Use Permits and Non-Residential Use Permits. Information concerning building permits may be obtained by calling 703-222-0801.

Sincerely,

/s/ Paula A. McFarland
Paula A. McFarland, Deputy Clerk
Board of Zoning Appeals

Department of Planning and Zoning
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5509
Phone 703 324-1290
FAX 703 324-3924
www.fairfaxcounty.gov/dpz/

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County of Fairfax, Virginia

MEMORANDUM

DATE: July 20, 2006

To: All this may concern
Staff, Applicant's Agent, File

From: Paula A. McFarland, Deputy Clerk
Board of Zoning Appeals

Subject: Corrected Resolution for Trustees of the Antioch Baptist Church
SPA 90-S-057-03

To all concerned:

Because of a typographical error in the first paragraph of the first development condition in the above referenced case heard July 11, 2006, attached is a corrected resolution.

I assume it easier to replace the entire document than have to unstaple and then replace just Page 2. Therefore, please dispose of your initial copy and replace it with the enclosed.

If you have any questions, please call me at 703-324-1280.

I am thanking you in advance for your patience and consideration in this matter and apologize for any inconvenience this error may have caused you.

Department of Planning and Zoning
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5509
Phone 703 324-1290
FAX 703 324-3924
www.fairfaxcounty.gov/dpz/

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COUNTY OF FAIRFAX, VIRGINIA

SPECIAL PERMIT RESOLUTION OF THE BOARD OF ZONING APPEALS

TRUSTEES OF THE ANTIOCH BAPTIST CHURCH, SPA 90-S-057-03 Appl. under Sect(s). 3-103 and 3-C03 of the Zoning Ordinance to amend SP 90-S-057 previously approve for church to permit increase in land area, building addition and site modifications. Located at 10901 and 10915 Olm Dr., 6525 and 6531 Little Ox Rd., 6340 Sydney Rd. and 6400 Stoney Rd. on approx. 20.91 ac. of land zoned R-1, R-C and WS. Springfield District. Tax Map 77-3 ((3)) 27, 30 and 34; 87-1 ((1)) 2, 2A, 5 and 6. Ms. Gibb moved that the Board of Zoning Appeals adopt the following resolution:

WHEREAS, the captioned application has been properly filed in accordance with the requirements of all applicable State and County Codes and with the by-laws of the Fairfax County Board of Zoning Appeals; and

WHEREAS, following proper notice to the public, a public hearing was held by the Board on July 11, 2006; and

WHEREAS, the Board has made the following findings of fact:

1. The applicant is the owner of the land.

2. The four or five issues of concern were thoroughly briefed by both sides and

there was sufficient time to review the well-documented information submitted from either side.

3. The citizens' concern about the wetland issue is appreciated, but the Corp of Engineers had passed on it, and they are entrusted to have properly looked at it.

4. The Department of Public Works and Environmental Services (DPWES) has passed on it, and there probably will be another review and a number of iterations on it by the County.

5. The outfall issue is a concern for all in Fairfax County, and DPWES has adopted stringent new standards to determine and figure outfalls, and there are many engineers working on it, which should address the neighbors' concerns.

6. The church will be held accountable and must monitor its stormwater management system and rain gardens.

7. The traffic issue is a problem especially on Sundays, and one sympathizes with the neighbors, but a community church has the right to exist.

8. The County's expert traffic engineer, Angela Rodeheaver, performed traffic

counts; her Department thoroughly assessed it; the determinations were passed on; and although the situation is not ideal, there are other areas in Fairfax County that are not ideal on Sundays; it is part of the County's urbanization.

9. The septic system was thoroughly assessed by a Fairfax County Health Department engineer expert who testified at length about its functions, capabilities, and reliability. It was noted that there are other larger septic fields functioning for years in the County.

10. The church is tasked with the system's continual monitoring and any possibility of a power outage, and several development conditions were added to address the matter.

11. Although it is a rather subjective view of the proposed expansion's compatibility with the residential surroundings, staff, who are professionals, have determined that it is compatible.

12. New lots were added that will have conservation easements, and the trees cannot be razed. There should be sufficient buffering.

13. It is regrettable that there will be disappointed people regardless of this case's resolution.

AND WHEREAS, the Board of Zoning Appeals has reached the following conclusions of law:

THAT the applicant has presented testimony indicating compliance with the general standards for Special Permit Uses as set forth in Sect. 8-006 and the additional standards for this use as contained in Sect(s). 3-103 and 3-C03 of the Zoning Ordinance.

NOW, THEREFORE, BE IT RESOLVED that the subject application is **APPROVED** with the following limitations:

1. This approval is granted to the applicant only, Antioch Baptist Church and is not transferable without further action of this Board, and is for the location indicated on the application 6525 and 6531 Little Ox Road, 10901 Olm Drive, 10915 Olm Drive, 6400 Stoney Road and 6340 Sydney Road and is not transferable to other land.

2. This special permit is granted only for the purpose(s), structure(s) and/or use(s) indicated on the special permit plat prepared by William H. Gordon Associates , Inc., dated January 2006, as revised through June 28, 2006 sheets one (1) through seven (7) and approved

with this application, as qualified by these development conditions.

3. A copy of this special permit and the Non-Residential Use Permit (Non-RUP) SHALL BE POSTED in a conspicuous place on the property of the use and be made available to all departments of the County of Fairfax during the hours of operation of the permitted use.

4. This special permit amendment is subject to the provisions of Article 17, Site Plans. Any plan submitted to the Department of Public Works and Environmental Services (DPWES) pursuant to this special permit, shall be in substantial conformance with these conditions. Minor modifications to the approved special permit may be permitted pursuant to Par. 4 of Sect. 8-004 of the Zoning Ordinance.

5. The maximum number of seats in the main area of worship shall be 1,250.

6. There shall be no worship services in the building located on Lot 6; prior to issuance of a Non-RUP for the new sanctuary, the church pews shall be removed and this building shall be converted to a multipurpose ministry building with ancillary support uses.

7. Parking shall be provided as depicted on the special permit plat. All parking shall be on site. There shall be no overflow parking permitted along adjacent subdivision streets. The applicant shall make all members aware of this restriction. In addition, the applicant will encourage car-pooling among its members and shall designate a person within the church administration to act as a point of contact for neighbors with traffic concerns.

8. Transitional screening shall be modified along all lot lines to permit existing vegetation to satisfy the requirements, but shall be supplemented as shown on the plat, with the following additions:

   - In the event that a storm sewer easement is not required on adjacent Lots 28 and 29, the easement area shown on the plat shall be planted with shrubs along the northern lot line as shown on the Landscape Plan. If an easement is required and obtained to allow a drainage swale in lieu of a storm sewer pipe, a barrier shall be installed on the subject property across the cleared area within the plantings, subject to approval of DPWES, on the north side of the

barrier to minimize the view of the subject property.

- Transitional screening consisting of a minimum of 25.0 feet in width shall be provided on the southern edge of the proposed septic drainage, along Little Ox Road to shield the view of the parking area and buildings from the road.

Notwithstanding that which is shown on the plat, the extent of tree preservation shall be the greatest extent possible on-site, as determined by the Urban Forest Management (UFM), DPWES, and supplemental plantings over and above that which is shown on the plat as determined by UFM. The size, species and location of all supplemental and transitional screening plantings shall be determined in consultation with UFM and shall provide at a minimum Transitional Screening 1 along the northern and southern lot lines of Lot 2 and 2A and the northern lot lines of Lots 5 and 34.

A tree preservation plan shall be submitted to the UFM for review and approval at the time of site plan review. This plan shall designate, at a minimum, the limits of clearing and grading as delineated on the special

permit plat in order to preserve to the greatest extent possible individual trees or tree stands that may be impacted by construction.

All trees shown to be preserved on the tree preservation plan shall be protected by tree protection fencing a minimum of four feet in height to be placed at the dripline of the trees to be preserved. Tree protection fencing in the form of a four foot high 14 gauge welded wire fence attached to six foot steel posts driven 18 inches into the ground and placed no further than ten feet apart, shall be erected at the final limits of clearing and grading and shown on the erosion and sediment control sheets. Tree protection fencing shall only be required for tree save areas adjacent to clearing and grading activities. The tree protection fencing shall be made clearly visible to all construction personnel. The fencing shall be installed prior to any construction work being conducted on the application property. A certified arborist shall monitor the installation of the tree protection fencing and verify in writing that the tree protection fence has been properly installed. Three days prior to commencement of any clearing and grading, UFM shall be notified and given the opportunity to inspect the site

to assure that all tree protection devices have been correctly installed.

9. Foundation plantings and shade trees shall be provided around the church building to soften the visual impact of the structures. The species, size and location shall be determined in consultation with UFM.

10. The barrier requirement shall be waived, except for Lot 6 and as qualified by these conditions.

11. Interior and peripheral parking lot landscaping shall be provided, at a minimum, in conformance with the requirements of Article 13 of the Zoning Ordinance. Size, species and number of all plantings shall be determined in consultation with UFM, at the time of site plan review.

12. The limits of clearing and grading shall be no greater than as shown on the SP Plat or as modified by these conditions and shall be strictly adhered to. A grading plan which establishes the final limits of clearing and grading necessary to construct the improvements shall be submitted to UFM, for review and approval. Prior to any land disturbing activities, a pre-construction conference shall be held between DPWES, including UFM, and representatives of

the applicant to include the construction site superintendent responsible for the on-site construction. In no event shall any area on the site be left denuded for a period longer than 14 days except for that portion of the site in which work will be continuous beyond 14 days.

13. Stormwater management and Best Management Practices facilities shall be provided as determined by DPWES. Low Impact Design (LID) facilities shall be provided as described on the plat, and as approved by DPWES. The underground Stormwater Management/ Best Management Practices facility may be reduced in size or removed if it is determined by DPWES that the LID facilities can adequately accommodate stormwater volume and quality requirements. The applicant shall enter into an agreement with DPWES, in such a form as required by DPWES, at the time of site plan approval that sets forth a maintenance schedule and procedure for the underground detention facility.

14. Right-of-way dedication shall be provided as depicted on the plat, or as determined by the Department of Transportation and the Virginia Department of Transportation (VDOT). The right-of-way shall be dedicated for

public street purposes and shall convey to the Board of Supervisors in fee simple on demand or at the time of site plan approval, whichever occurs first.

15. Any proposed lighting shall be provided in accordance with the Performance Standards contained in Part 9 (Outdoor Lighting Standards) of Article 14 of the Zoning Ordinance. Outdoor lighting fixtures shall not exceed twelve (12) feet in height from the ground to the highest point of the fixture, shall be of low intensity design and shall utilize full cut-off fixtures which focus directly on the subject property. Parking lot lighting shall be turned off one-half hour after any event held at the church. Outdoor building-mounted security lighting shall be shielded to prevent off-site glare.

16. The applicant shall obtain a sign permit for the proposed sign, which shall comply with the provisions of Article 12 of the Zoning Ordinance.

17. The applicant shall exercise diligent attempts as determined by VDOT to abandon Stoney Road, where it bisects the subject application property, subject to approval of VDOT. Should the abandonment be approved, the applicant shall scarify the existing road pavement and revegetate the area,

while allowing unimpeded pedestrian traffic from Lot 6 to the adjacent application properties. The applicant shall scarify and revegetate the roadway in accordance to procedures approved by UFM.

18. In order to ensure safe and expedient access to and from the church during Sunday morning church services, the applicant shall provide police assistance for traffic control. The police shall direct traffic at the main entrance to the Church. Additionally, the applicant shall install directional signs on site to assist motorists entering and existing the property.

19. The dwelling on Lot 27 shall be used only as a residence and occupied only by an employee or member of the church and his/her family.

20. The proposed septic drainfield shall be subject to review by the Fairfax County Health Department. Groundwater mounding and nitrate loading calculations shall be conducted and shall meet the required standards of the County and the State. Groundwater monitoring wells shall be provided in the areas shown on the special permit plat or in areas designated by the County. Pretreatment of effluent shall be provided. Finally, an equalization

tank shall be utilized to mitigate peak flows. If the proposed septic drainfield cannot accommodate the application proposal, the applicant shall be required to apply for a special permit amendment.

21. If determined necessary by VDOT at the time of site plan approval, to provide storage capacity, the applicant shall design and construct a left turn lane on Little Ox Road, within the existing right-of-way, into the main entrance of the property.

22. The applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase I Archaeological Study of the application property, and provide the results of such studies to the Cultural Resource Management and Protection Section (CRMPS) of the Fairfax County Park Authority. If deemed necessary by CRMPS, the Applicant shall conduct a Phase II and/or Phase III Archaeological Study on only those areas of the application property identified for further study by CRMPS. The studies shall be conducted by a

qualified archaeological professional approved by CRMPS, and shall be reviewed and approved by CRMPS.

23. The applicant will have septic field monitoring reports prepared by an independent consultant approved by Fairfax County Department of Health. Said monitoring reports shall be prepared in writing by the consultant and submitted to the Health Department on a monthly basis for a period of two years commencing on the issuance of the occupancy permit for the new sanctuary. Thereafter, monitoring reports will be submitted periodically as required by the Health Department.

24. The applicant shall notify the Health Department immediately when the septic system exceeds capacity or fails.

25. In the event of failure of the septic system, the applicant shall discontinue its operations immediately until it can bring the septic system into compliance with applicable Health Department standards and obtain the approval of the Health Department before resuming operations.

26. The building construction shall be generally consistent with the architecture presented in the revised concept elevation in the staff report

(Attachment 1). The building will utilize residential type materials such as brick, siding, and asphalt shingles or metal roof or other building material, residential in character, to complement the surrounding community. The design shall incorporate elements such as hip roofs in segmented masses so as to reduce the apparent scale.

These conditions supersede all previous conditions. This approval, contingent on the above-noted conditions, shall not relieve the applicant from compliance with the provisions of any applicable ordinances, regulations, or adopted standards. The applicant shall be responsible for obtaining the required Non-Residential Use Permit through established procedures, and this special permit shall not be valid until this has been accomplished.

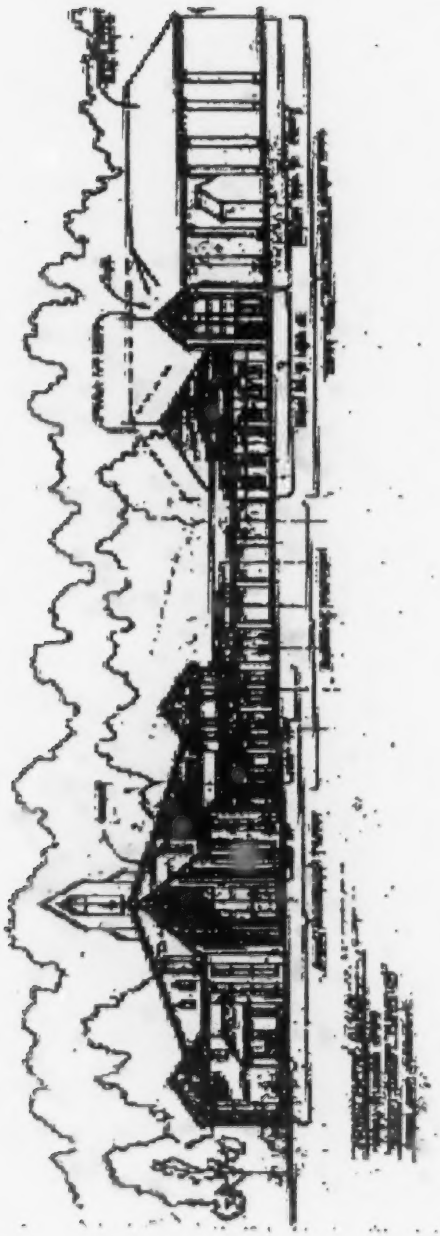
Pursuant to Sect.8-015 of the Zoning Ordinance, this special permit shall automatically expire, without notice, thirty (30) months after the date of approval unless construction has commenced and been diligently prosecuted. The Board of Zoning Appeals may grant additional time to establish the use if a written request for additional time is filed with the Zoning Administrator prior to the date of expiration of the special permit. The request must specify the amount of additional time requested, the basis for the amount of time requested and an explanation of why additional time is required.

Mr. Ribble seconded the motion, which carried by a vote of 4-3. Mr. Beard, Mr. Byers, and Mr. Ribble voted against the motion.

A Copy Teste:

/s/ Paula A. McFarland
Paula A. McFarland, Deputy Clerk
Board of Zoning Appeals

ATTACHMENT 1



VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of April, 2008.

James Jackson, et al., Appellants,

against Record No. 072147
Circuit Court No. CL-2006-0010122

Board of Zoning Appeals of
Fairfax County, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 20th day of February, 2008 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JAMES JACKSON, et al,	)	
	)	
Petitioners,	)	
	)	
v.	)	**CL No.: 2006-10122**
	)	
BOARD OF ZONING APPEALS, et al,	)	
	)	
	)	
Respondents.	)	

ORDER

THIS MATTER CAME ON the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007; it is therefore

ADJUDGED, ORDERED and DECREED that the Petitioners' Motion for Reconsideration of the Court's rulings on July 19, 2007 is denied.

ENTERED THIS 17 DAY OF AUGUST, 2007

/s/ Charles J. Maxfield
Judge Charles J. Maxfield

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAMES JACKSON, et. al.,	:	
	:	
Petitioner,	:	
VS	:	CL 2006-10122
	:	
BOARD OF ZONING APPEALS, FAIRFAX COUNTY, VIRGINIA,	:	
	:	
Respondent.	:	

Thursday, July 19, 2007

Fairfax, Virginia

The above-entitled cause came to be heard before the Honorable Charles J. Maxfield, a Judge in and for the Circuit Court of Fairfax County, in courtroom 5D, Fairfax County Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia, beginning at approximately 10:05 o'clock a.m., when there were present on behalf of the respective parties:

Appearances:

For the Plaintiff:

GARY PISNER, PRO SE

On behalf of the Defendant:

GRAYSON P. HANES, ESQUIRE
ROBERT A. LAWRENCE, ESQUIRE
Reed Smith, LLP
3110 Fairview Park Drive
Suite 1400
Falls Church, Virginia 22042
(703) 641-4200 FAX (703) 641-4340

*** *** ***

THE COURT: Let me start initially by citing the standard of review, because, to a large extent, that is dispositive in these kinds of proceedings.

An appeal of a decision of the Board of Zoning Appeals of a special permit -- well, the special permit is presumed to be correct. The Plaintiff may rebut the presumption by showing that the BZA, Board of Zoning Appeals, applied erroneous principles of law, or, if it is discretionary, if discretion is involved in the case, the Board of Zoning Appeals was plainly wrong and in violation of the purposes and intent of the Zoning Ordinance.

The reliance in the brief at two points in both the Petitioner's brief and the reply brief in the previous Paragraph 23.14 sets up a de novo standard for certain other kinds of reviews. It is troubling. I don't know why it was in there. It has got no applicability to this case.

The case law on this, which is consistent with the standards that are now in the Code, finds that special permits are legislative acts, and that the

Petitioner must show them unreasonable by reference to the record. Most recently, I guess, that standard has been enunciated by Judge Bellows of this Court, and I believe that still is the standard.

I have divided Petitioner's arguments into about four separate arguments. I think I'll deal with all issues by going through these four arguments. He first argues that the special permit fails to conform with the Comprehensive Plan. For the sake of argument here today -- because I'm not certain that I really resolved the issue -- I'm going to take the position that the goals and objectives of the Comprehensive Plan are part of the Plan, and I'm going to deal with them just the same as the R-1 and R-C limitations.

Reference to 23.14 based on the Comprehensive Plan does not have the status of the Zoning Ordinance. It is advisory only and serves as a guide to the zoning body. The Zoning Ordinance states, however, that the special exception must be in harmony with this plan. Now, specifically, they are talking about R-1 and R-C. And, as Mr. Hanes pointed out quite correctly, I believe, the all new building in this area is on R-1 property, which is not as restrictive as R-C. And with respect to that, Petitioner has made a large part of his argument talking about protection of the watershed in the Comprehensive Plan. Of course, the R-1 has specific density requirements, too, and I'll talk about that in a few minutes.

But let's talk for a second about the watershed -- protection of Burke Lake, or Occoquan, or any

other lake or stream in the area. That was the heart of the hearing in this case. The original Petitioners, Petitioners for the special exception, put on a case where they really showed how they were going to control rainwater through the rain garden, a cistern, and the swale, and how they are going to handle sanitary sewage through a septic field. And there was a lot of discussion about this before the Board. They even addressed what would happen in the event of a hurricane, because apparently there is some electronic pumping that is involved in this septic system, and the engineer -- County worker, I believe, from the Health Department -- that was talking about this satisfied them that in the event they lost electricity the environment would not be compromised.

In summary, I think the Board had more than enough evidence to address these issues about the Comprehensive Plan and the protection of the watershed. I certainly cannot say that they were unreasonable in their decision that the Comprehensive Plan wasn't violated.

Next, the Petitioner argues that the proposed use is not in harmony with the zoning district regulations, which I took to mean the Zoning Ordinance. And here I will talk about some more specific complaints he has, talking about height of the building, the floor area ratio, and some of the other issues about grading, which really didn't develop here much in the oral arguments, but he did present it in his brief. And I just am not convinced that there is any evidence in the record that the Board was plainly wrong on these parts. The

engineers came up with a floor area ration of .92. They restricted the height of this building to forty feet, even though the R-1 would allow, I believe, sixty feet, but they have restricted it to forty feet. And they have made an argument here today that I find persuasive that if, for some reason because of the grading of the soil, what they have presented here isn't in actuality they are going to be called up for site review -- site plan review. Again, I think they acted quite reasonably in reaching the determination that the Zoning Ordinance had not been violated in this area.

And then there were testimony about other issues, which, again, I think Judge Bellows correctly pointed out in the eight standards that you have to look at, but I'm just going to talk about the ones that were raised by Petitioner; the buffer zone, reduction in value of neighboring area, and really just a general attack of the overall size of this building, which, again, wasn't argued orally here today too much. But I think that is at the basis of a lot of the complaints of the neighboring citizens, and I certainly did see that in the record in a lot of the testimony, just people talked about this as being almost as big as a Walmart. I think the Board member talked about it being as large as the second largest Catholic church in the world, or something like that.

Again, the Board, I thought, handled this really well. They talked about the buffer with respect to the location of all the houses in the area. They obviously looked at that. They talked about the buffer with respect to the existing forestation on the

property and what made sense to do in this case. And I think I have to accept their judgment. I don't think there is anything unreasonable about it.

They talked about the size of this building. And it came out that there are actually at least three churches in this County that are larger; one three and a half times larger than this particular church, one which has the name Burke in it, which I can't imagine is too far from this cite, is almost a similar size. So, they addressed the issue. They were aware of the issue. They were aware of how large this building was and what it would do to an R-1 district, and I am not going to second guess their judgment call there.

Other issues that were raised. Valuation. I would concede that the evidence here was pretty weak in that the people opposed to the rezoning brought a real estate appraiser, and I think there was testimony of one person -- one homeowner in the area -- that she had noticed a changed -- or she noticed an increase in her value since 1990 when the original church went in. You know, a Court might find a real estate appraiser's valuation is entitled to greater weight than a citizen, but certainly there was evidence in the record on both sides of that issue. And I think, of necessity, in many zoning decisions the surrounding property is going to be affected financially -- any shopping center near a residential district -- and I can't believe that the Comprehensive Plan -- even if I were to find that there is a diminution in property value, the Comprehensive Plan says -- or the Zoning Ordinance says you can't have any special permits if it reduces

the value of any property. I can't believe that is the law. The BZA did have evidence on both sides of that issue. I can't find their resolution of that question unreasonable.

Transportation. This document, which I believe starts at -- Is it 424 of the record, sir?

MR. HANES: That's correct, sir.

THE COURT: It is really persuasive on that issue. I thought that was handled really well by the Respondent in that, in fact, the traffic has decreased dramatically with the improvement of Route 123. Also the plan as approved by the BZA takes into account whether or not Stoney Road is going to be abandoned. I don't think there is any question but that the special permit is in harmony with the neighboring properties.

With respect to procedure, Petitioner cites the Goldberg case. I am told that case has been limited in its terms to Social Security rights by subsequent decisions. But that issue aside, I think your reliance is misplaced, because this clearly is a legislative hearing. And the due process in a legislative hearing, I think, is quite well set out in McIntyre versus Plunkett, 250 Va 27. You have a right to notice, you have a right to opportunity to be heard, and you have a right to a decision. There is no right to cross examine, there is no right to object to the testimony of the people that are testifying. And I would note that in this case, in addition to those rights, there was the right, apparently, to submit

evidence prior to the hearing, because that, in fact, happened.

In summary, each issue that was raised by the Petitioner -- the septic, the environment, the runoff, the buffer zone, the height, the FAR, the size, the traffic -- was fully vetted at the hearing on July 11th, 2006. All of those issues were raised. There was evidence on both sides of those issues. There was evidence by the Petitioner in their engineering drawings, there was evidence from the Staff Report, and there was evidence from the witnesses, in some cases from the Health Department.

The Board fully entertained all of the concerns of the citizens who appeared and received documents in support of their o opposition. I am not without sympathy to the Plaintiff with respect to the due process arguments. However, legislative acts are not to be overseen by the Judicial Branch. This is more properly a political function. It is not the role of the Court to substitute its judgment for that of the Board of Zoning Appeals. I have concerns about the issues raised by the Plaintiff, as Mr. Hanes candidly said he had concerns about them, too.

Now, when you get into a plan for handling rainwater and sanitary sewer, everybody is concerned that it is going to work properly. But nothing in the Petitioner's submissions convinces me that the BZA applied erroneous principles of law or was plainly wrong and in violation of the Zoning Ordinance. The petition is dismissed.

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CERTIFICATE OF COURT REPORTER

I, Terrie A. Stipes, do hereby certify that I took the stenographic notes of the foregoing proceedings and the same were reduced to typewriting under my direction; that the foregoing is a true record of said proceedings; that I am neither related to nor employed by any of the parties to the action herein; and, further, that I am not a relative or employee of any attorney or counsel or employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

/s/ Terrie A. Stipes
Terrie A. Stipes
Certified Verbatim Reporter

BY-LAWS
BOARD OF ZONING APPEALS
FAIRFAX COUNTY, VIRGINIA

*** *** ***

ARTICLE VIII. REQUEST FOR REHEARING AND RECONSIDERATION

1. A party may request a rehearing by filing said request in writing with the Clerk within seven (7) days of date of the decision sought to be reheard and reconsidered. A decision will not be reheard or reconsidered at the original meeting where it was made.

2. The request must establish one or more of the following:

   a. The BZA overlooked or misunderstood a material fact or legal issue which would change the decision sought to be reheard.

   b. The existence of new and material evidence, which (i) was not previously available, (ii) could not have been reasonably discovered previously after diligent investigation, and (iii) could change the decision sought to be reheard.

3. A request for rehearing and reconsideration will be considered by the BZA at its next regularly scheduled meeting.

4. A motion to grant a rehearing must be made by at least one (1) member who voted in favor of the decision sought to be reheard.

5. If a decision is made granting a request for rehearing, the BZA will (i) set a date for rehearing, and (ii) notice will be given by the applicants or by the staff of the Department of Planning and Zoning as required by law and these Bylaws.

6. A rehearing shall proceed in the same manner as a regular BZA hearing.

7. A request for rehearing and reconsideration alone will not change the deadlines for appeal under the Code of Virginia and Zoning Ordinance.

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The Zoning Ordinance of Fairfax County, Virginia

ARTICLE 8

SPECIAL PERMITS

PART 0 8-000 GENERAL PROVISIONS

*** *** ***

8-002 Authorization

In consideration of an application filed with the Zoning Administrator, the BZA may authorize the establishment of those uses that are expressly listed as special permit uses in a particular zoning district; provided, however, that no such permit shall be required for a use allowed as a permitted use in such district, notwithstanding that such use may also be included in a use group available by special permit.

No special permit use shall be authorized unless said use complies with all of the applicable standards of this Article 8 and all other applicable requirements of this Ordinance.

*** *** ***

8-006 General Standards

In addition to the specific standards set forth hereinafter with regard to particular special permit uses, all special permit uses shall satisfy the following general standards:

1. The proposed use at the specified location shall be in harmony with the adopted comprehensive plan.

2. The proposed use shall be in harmony with the general purpose and intent of the applicable zoning district regulations.

3. The proposed use shall be such that it will be harmonious with and will not adversely affect the use or development of neighboring properties in accordance with the applicable zoning district regulations and the adopted comprehensive plan. The location, size and height of buildings, structures, walls and fences, and the nature and extent of screening, buffering and landscaping shall be such that the use will not hinder or discourage the appropriate development and use of adjacent or nearby land and/or buildings or impair the value thereof.

4. The proposed use shall be such that pedestrian and vehicular traffic associated with such use will not be hazardous or conflict with the existing and anticipated traffic in the neighborhood.

5. In addition to the standards which may be set forth in this Article for a particular group or use, the BZA shall require landscaping and screening in accordance with the provisions of Article 13.

6. Open space shall be provided in an amount equivalent to that specified for the zoning district in which the proposed use is located.

7. Adequate utility, drainage, parking, loading and other necessary facilities to serve the proposed use shall be provided. Parking and loading requirements shall be in accordance with the provisions of Article 11.

8. Signs shall be regulated by the provisions of Article 12; however, the BZA, under the authority presented in Sect. 007 below, may impose more strict requirements for a given use than those set forth in this Ordinance.

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8-303 Standards for all Group 3 Uses

In addition to the general standards set forth in Sect. 006 above, all Group 3 special permit uses shall satisfy the following standards:

1. Except as may be qualified in the following Sections, all uses shall comply with the lot size and bulk regulations of the zoning district in which located; however, subject to the provisions of Sect. 9-607, the maximum building height for a Group 3 use may be increased.

2. All uses shall comply with the performance standards specified for the zoning district in which located.

3. Before establishment, all uses, including modifications or alterations to existing uses, except home child care facilities, shall be subject to the provisions of Article 17, Site Plans.

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The Zoning Ordinance of Fairfax County, Virginia

ARTICLE 19

BOARDS, COMMISSIONS, COMMITTEES

PART 2 19-200 BOARD OF ZONING APPEALS

*** *** ***

19-202 Authority and Establishment

The Board of Zoning Appeals was established pursuant to the provisions of Article 7, Chapter 22, Title 15.2 of the Code of Virginia. The Board of Zoning Appeals heretofore established shall continue as the Board of Zoning Appeals for the purpose of this Ordinance.

The official title of this Board shall be the 'Fairfax County Board of Zoning Appeals', and such body shall also be known by the abbreviation 'BZA'.

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The Zoning Ordinance of Fairfax County, Virginia

ARTICLE 19

BOARDS, COMMISSIONS, COMMITTEES

PART 2 19-200 BOARD OF ZONING APPEALS

*** *** ***

19-205 Meetings

*** *** ***

6. All public hearings conducted by the BZA shall be in accordance with the provisions of Sect. 18-109. All hearings shall be open to the public, and any person affected may appear and testify at such hearing, either in person or by an authorized agent or attorney.

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The Zoning Ordinance of Fairfax County, Virginia

ARTICLE 19

BOARDS, COMMISSIONS, COMMITTEES

PART 2 19-200 BOARD OF ZONING APPEALS

*** *** ***

19-209 Powers and Duties

The BZA shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, interpretation or determination made by the Zoning Administrator or any other administrative officer in the administration or enforcement of this Ordinance, all as provided in Part 3 of Article 18.

2. To authorize upon application in specific cases such variance from the terms of this Ordinance as will not be contrary to the public interest, when owing to special conditions, a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the Ordinance shall be observed and

substantial justice done, all as provided in Part 4 of Article 18.

3. To hear and decide applications for such special permits as are authorized under Article 8 of this Ordinance.

4. To hear and decide applications for interpretation of the Zoning Map where there is uncertainty as to the location of a zoning district boundary. After notice to the owners of the property affected by any such interpretation, and after a public hearing thereon, the BZA shall interpret the Map in such a way as to carry out the purpose and intent of this Ordinance for the particular district in question. The BZA shall not have the power, however, to rezone property or to change substantially the location of zoning district boundaries as established by this Ordinance.

5. To hear and decide all other matters referred to and upon which it is required to pass by this Ordinance.

6. To make, alter and rescind rules and forms for its procedures, consistent with the ordinances of the County and the general laws of the State.

7. To prescribe procedures for the conduct of public hearings that it is required to hold.

8. To perform those additional activities set forth in this Part.

9. To employ or contract for, within the limits of funds appropriated by the Board of Supervisors, secretaries, clerks, legal counsel, consultants and other technical and clerical services.

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Va. Code § 15.2-2204

§ 15.2-2204. Advertisement of plans, ordinances, etc.; joint public hearings; written notice of certain amendments.

A. Plans or ordinances, or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a descriptive summary of the proposed action and a reference to the place or places within the locality where copies of the proposed plans, ordinances or amendments may be examined.

The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for two successive weeks in some newspaper published or having general circulation in the locality; however, the notice for both the local planning commission and the governing body may be published concurrently. The notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than five days nor more than 21 days after the second advertisement appears in such newspaper. The local planning commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If a joint hearing is held, then public notice as set forth above need be given only by the governing body. The term "two successive weeks" as used in this paragraph shall mean that such notice shall be published at

least twice in such newspaper with not less than six days elapsing between the first and second publication. After enactment of any plan, ordinance or amendment, further publication thereof shall not be required.

B. When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of 25 or fewer parcels of land, then, in addition to the advertising as above required, written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved; to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected, including those parcels which lie in other localities of the Commonwealth; and, if any portion of the affected property is within a planned unit development, then to such incorporated property owner's associations within the planned unit development that have members owning property located within 2,000 feet of the affected property as may be required by the commission or its agent. Notice sent by registered or certified mail to the last known address of such owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed adequate compliance with this requirement. If the hearing is continued, notice shall be remailed. Costs of any notice required under this chapter shall be taxed to the applicant.

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A party's actual notice of, or active participation in, the proceedings for which the written notice provided by this section is required shall waive the right of that party to challenge the validity of the proceeding due to failure of the party to receive the written notice required by this section.

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Va. Code § 15.2-2286

§ 15.2-2286. Permitted provisions in zoning ordinances; amendments; applicant to pay delinquent taxes; penalties.

A. A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

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3. For the granting of special exceptions under suitable regulations and safeguards; notwithstanding any other provisions of this article, the governing body of any locality may reserve unto itself the right to issue such special exceptions.

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Va. Code § 15.2-2309

§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

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2. To authorize upon appeal or original application in specific cases such variance as defined in § 15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly

demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

No variance shall be authorized except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or

recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

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6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the

conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

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Va. Code § 15.2-2310

§ 15.2-2310. Applications for special exceptions and variances.

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No special exceptions or variances shall be authorized except after notice and hearing as required by § 15.2-2204.

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Va. Code § 15.2-2314

§ 15.2-2314. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board.

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If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

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In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, or application for a special exception, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is

involved, the decision of the board of zoning appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance.

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